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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

TUG OCEAN PRINCE, INC. and RED STAR TOWING & TRANSPORTATION CO.,

Petitioners,

v.

UNITED STATES OF AMERICA, and PITTSTON MARINE TRANSPORT CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co. pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this cause.

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported, but is reported unofficially at 1978 A.M.C. 1786, and is printed in the Appendix. (A-1). The opinion of the United States District Court for the Southern District of New York is reported at 436 F.Supp. 907, 1978 A.M.C. 1806 and is printed in the Appendix. (B-1).

Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the Admiralty Clause of the Constitution (Article III, Section 2, Clause 3); 28 U.S.C. § 1333 (1970); F.R. Civ.P., Rule 9(h); 46 U.S.C. § 183-89 (1970) and 46 U.S.C. § 742 (1970).

The judgment of the Court of Appeals was entered August 7, 1978. (E-1). A petition for rehearing with a suggestion for a hearing *in banc* was filed by Petitioners on August 21, 1978, and was denied September 26, 1978. (D-1).

The jurisdiction of this Court to review the judgment in question is based on 28 U.S.C. §§ 1254(1) and 2101(c).

Questions Presented

Whether, in reversing the District Court, the Court of Appeals erred:

1. In denying limitation of liability to $100 per ton of the gross tonnage of the Tug Ocean Prince for the Government's costs of cleaning up oil that the Tug caused to be discharged from a barge in tow of that vessel, as provided in the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1321 (Supp. II 1977), by applying to the statutory exception to the right of limitation under that Act a definition of "willful misconduct" at variance with the definition of that term given to it by the United States Court of Appeals for the District of Columbia and Sixth Circuits, and by the United States District Court for the Eastern District of Virginia;

2. In denying limitation of liability to the value of the Tug and the earnings of the trip on which it was engaged for the damage to the Barge and the loss of the oil discharged, as provided in the Limitation of Liability Act, by applying to the statutory exception to the right of limitation under that Act an interpretation of "privity and knowledge" at variance with the decisions of this Court, as well as the lower federal courts?

Statutory Provisions Involved

The first question presented involves the correct interpretation and application of the section of the Federal Water Pollution Control Act, ("Pollution Act") 33 U.S.C. § 1321 (Supp. II 1977),[1] which at the material times provided, *inter alia*:

> (g) In any case where an owner or operator of a vessel * * * from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omis-

[1] The Clean Water Act of 1977, 33 U.S.C. § 1321(g) (Supp. 1978), increased the per ton limit to $150 and removed the 14 million "ceiling".

sion of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses [*sic*]. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. * * * If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. * * *

The complete text of Section 1321(g) is set out in Appendix C.

The second question presented involves the proper interpretation and application of the Limitation of Liability Act, 46 U.S.C. § 183(a), which provides:

§183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Statement of the Case

On February 3, 1974, the Barge NEW LONDON, fully loaded with oil and in forward tow of the Tug OCEAN PRINCE, ran aground on a submerged rock formation in the Hudson River. The Barge was damaged, causing oil to escape into the river, and pollution clean-up operations were undertaken by the Coast Guard.

Petitioners Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co. (hereinafter collectively referred to as "Red Star"), as Owner and Charterer of the OCEAN PRINCE, commenced an action for exoneration from or limitation of liability. A claim was filed by Respondent Pittston Marine Transport Corporation ("Pittston") for damage to the Barge and loss of its oil cargo. Subsequently, the Government commenced an action against Red Star and Pittston to recover its pollution removal expenses. The two actions were consolidated for trial.

The Barge had been taken in tow on February 2nd at Bayonne for a trip up the Hudson to Kingston. The tug was fully manned with a crew of six, including two navigators, John Kiernan and Walter Reimer. Reimer had been a tug captain for five years and was licensed by the Coast Guard as operator of uninspected towing vessels, such as the OCEAN PRINCE, on the inland waters, including the Hudson. Reimer had not navigated the Hudson before, although he had served as a deckhand on tankers on that river. He had been employed as a member of the permanent crew of the OCEAN PRINCE for about 1½ years. Kiernan was also licensed by the Coast Guard and had more than 30 years experience as a tugboat captain on the Hudson. He was employed by a company associated with Red Star, whose dispatchers worked from the same office as Red Star's dispatchers, and had been temporarily assigned to the OCEAN PRINCE to fill a vacancy. Kiernan had boarded the Tug on February 1st. Reimer had been on vacation prior to the trip in question, and had rejoined the Tug on February 2nd.

On February 1st, Red Star had received an order from Pittston for a tug to tow the Barge NEW LONDON to Kingston over the weekend. The order was entered on a job card, which was sent to the dispatcher's office. On February 2nd, Red Star was advised that the Barge was ready, and its night dispatcher, Philip Keenan, assigned the OCEAN PRINCE to do the job. Keenan was aware of the make-up of the pilothouse crew of the OCEAN PRINCE, and had been told by the day dispatcher that Kiernan was captain and Reimer was mate. Although he knew of Reimer's lack of experience as a navigator on the Hudson, Keenan decided that the OCEAN PRINCE was suitable for the trip, since Reimer was a tug captain of proven ability and Kiernan was on board and would be available to assist whenever necessary.

At trial, Kiernan expressed some doubt in his own mind that he had been designated captain for the trip. Keenan did not discuss with Kiernan or Reimer who was to be captain and who was to be mate, but understood from the day dispatcher that Kiernan had been designated captain. The District Court found that despite Kiernan's professed doubt as to the chain of command, he occupied the captain's cabin, stood the captain's watch, and performed administrative tasks which were the captain's responsibility, including preparation of the payroll record, in which Kiernan designated himself as "captain" and Reimer as "alternate captain".

On the trip to Kingston, Kiernan and Reimer stood alternating six hour watches, with a deckhand assigned to each watch to assist the navigator and serve as lookout if required. Kiernan was on watch when the Tug and Barge left Bayonne at 7:15 P.M., and was relieved by Reimer at 11:30 P.M. At about 11:45 P.M., Kiernan went to the captain's quarters behind the pilothouse.

Shortly after 0100 hours on February 3rd, as the Tug and Barge passed under Bear Mountain Bridge, the tide was ebbing and visibility was about two miles. The tug's radar was operating, and the navigation chart for the area was out and in use. Reimer was fully aware that a submerged rock formation lay about 1¾ miles ahead and that it was marked by a black can buoy. As the Tug passed Mystery Point about one mile north of the bridge, Reimer became concerned because he had not spotted the buoy either on radar or visually. He therefore reduced speed, and turned on the Tug's powerful spotlight to search for the buoy. Shortly afterwards, the Barge's port bow struck the rock.

Kiernan came to the pilothouse immediately. The District Court found that regardless of whether he was cap-

tain or mate for the voyage, Kiernan would have come to the pilothouse to assist Reimer at any time before the grounding if he had been asked to do so.

The District Court found that *"the proximate and predominant causes of the grounding were errors in navigation on the part of Reimer";*[2] that these errors were in turn the result of an error in management on board the Tug, *i.e.,* that Reimer failed to request assistance from Kiernan when he became uncertain as to the Tug's position; that Reimer's failure to post a lookout did not contribute to the grounding (B-25); and that *the causes of the grounding were not within the privity and knowledge of any managing officers of Red Star.* (B-13, 17, 22-23, 25-26).

Accordingly, the District Court held that Red Star, while liable, was entitled to limitation of its liability to Pittston to the value of the Tug and the earnings of the trip under the Limitation of Liability Act, 46 U.S.C. § 183, and to limit its liability to the Government for pollution clean-up costs to $100 per ton of the Tug's gross tonnage under the Pollution Act, 33 U.S.C. § 1321. (B-41).

On appeal, the Court of Appeals reversed the District Court, holding that Red Star was not entitled to limitation of its liability to Pittston, and that the Government was entitled to recover the full amount of its pollution clean-up costs under the Pollution Act.[3]

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[2] Emphasis throughout has been added.

[3] The Court of Appeals affirmed the District Court's dismissal of claims by Red Star and Pittston against the Government for negligence in the maintenance of aids to navigation in the area of the grounding. The issues involved in the appeal from these dismissals are not raised in this Petition for a Writ of Certiorari.

Reasons for Granting the Writ

I.

In holding that the grounding of the Barge was the result of "willful misconduct within the privity and knowledge" of Red Star under the Pollution Act, the Court of Appeals has adopted an erroneous interpretation of the Act which seriously undermines the intent of Congress and conflicts with decisions of other Courts of Appeals under the Act, as well as the Warsaw Convention, 49 Stat. 3000, Article 25(1), governing limitation of liability for aircraft casualties. Both in its interpretation of the statutory language involved and its statements as to the public policy underlying the Pollution Act, the Court of Appeals has plainly misconceived the intent of Congress. If the decision below were allowed to stand, it would establish a basis of liability for water pollution clean-up costs never contemplated by Congress. The issues are therefore of great importance, and should be settled by this Court.

The legislative history and express language of the Pollution Act leave no doubt that Congress intended the comprehensive liability scheme for the recovery of the Government's oil spill clean-up expenses embodied in the Act to be based upon the principle of limitation of liability. See *Askew* v. *American Waterways Operators,* 411 U.S. 325, 330 (1973); *Burgess* v. *M/V Tamano,* 564 F.2d 964, 981 (1st Cir. 1977), *cert. denied,* 98 S.Ct. 1520 (1978). Under the Act, the owner of a vessel from which oil is discharged is strictly liable for the Government's clean-up expenses unless he can show that the discharge was the result of an act of God, an act of war, negligence of the United States, or an act or omission of a third party. 33 U.S.C. § 1321(f). Where, as here, he shows that the discharge was caused by an act or omission of a third party,

the Government is entitled to recover its clean-up costs from the third party. The amount of the Government's recovery, whether from the discharging vessel or from a vessel owned by a third party, is expressly limited, however, to amounts which Congress, after many hearings and much deliberation, concluded would be insurable. *See, e.g.,* Statement of Senator Muskie, March 24, 1970, in 3 EPA, Legal Compilation 1964 (1973).

Thus, the Act provides that the owner of the discharging vessel, or a third-party owner of a vessel causing the discharge, as the case may be, who is liable for the Government's clean-up expenses, is entitled to limit his liability to $100 per ton of the vessel's gross tonnage. This right of limitation of liability exists in all cases, except where the Government can show that the oil spill was the result of "willful negligence or willful misconduct within the privity and knowledge" of the owner of the responsible vessel, in which case the Government may recover the full amount of its removal costs.

Thus, two elements are necessary before the Government is entitled to "break" limitation: (1) it must prove "willful negligence or willful misconduct", and (2) it must prove that such "willful negligence or willful misconduct" was within the privity and knowledge" of the party responsible.

In the present case, the Court of Appeals concluded that the oil spill was the result of "willful misconduct", and held Red Star liable for the full amount of the Government's clean-up costs. Because "willful misconduct" is not defined in the Pollution Act, the Court of Appeals applied its own definition, formulated in cases involving the Warsaw Convention. As stated by the Court:

> In those cases arising under the Warsaw Convention, this circuit has established the following criteria for a finding of willful misconduct: an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences. *Pekelis* v. *Transcontinental & Western Air,* 187 F.2d 122 (2d Cir.), *cert. denied,* 341 U.S. 951 (1951). (A-24)

Red Star has no quarrel with the first part of the Court's definition of "willful misconduct", and agrees that it is "an act, intentionally done, *with knowledge that the performance will probably result in injury*". The Court found Red Star guilty of no act which met this test. Instead, the Court based its denial of the right to limit liability solely on its *alternative* definition of "willful misconduct" *i.e.,* "an act intentionally done . . . *in such a way as to allow an inference of a reckless disregard of the probable consequences.*" This alternative definition is not only contrary to the plain language of the Pollution Act, but conflicts with the definition of "willful misconduct" indicated by the Court of Appeals for the Sixth Circuit and the District Court for the Eastern District of Virginia, and by the Court of Appeals for the District of Columbia Circuit with respect to the Warsaw Convention.

The only other reported decision of a Circuit Court of Appeals involving the "willful misconduct" exception to the right of limitation of liability under the Pollution Act is *United States* v. *Hamel,* 551 F.2d 107 (6th Cir. 1977). There, the Court of Appeals for the Sixth Circuit affirmed the conviction of the defendant for willfully discharging gasoline into navigable waters in violation of the Pollution Act, 33 U.S.C. § 1319(c)(1). In its discussion of § 1319(c)(1), the Court stated that the Government had the same burden of proving scienter in recovering clean-up expenses under § 1321(f) [and therefore § 1321(g)]

as it does in establishing criminal liability under § 1319(c) for an unlawful discharge. According to the Court:

> Section 1319(c)(1) requires proof of negligent or wilful behavior and subjects violators to a fine of not less than $2,500 nor more than $25,000 per day of violation or by imprisonment for not more than one year, or both * * * With the amendments of 1972, Congress provided a harsher penalty for the discharge of oil with the added burden on the government to prove scienter. *We note the parallel provision in §1321(f) for more extensive civil liability with proof of scienter.* (551 F.2d at 113 n.9)

In the instant case, by holding that the denial of limitation of liability under the Pollution Act may be based upon a mere inference of a reckless disregard rather than proof by the Government of actual knowledge of probable injury, the Court of Appeals for the Second Circuit has clearly established a far lower standard of proof of "willful misconduct" than that required by the Court of Appeals for the Sixth Circuit in *Hamel.* Red Star submits that *Hamel* is correct, and that the Court of Appeals' decision herein is in error.

The decision also conflicts with *Matter of Steuart Transportation Company,* 435 F.Supp. 798 (E.D. Va. 1977),[4] where an oil spill was found to have been caused by the negligent failure of Steuart's managers and superintendents to properly inspect and remedy what were clearly visible defects that led to the sinking of a barge. The District Court held that while the negligence was within

[4] An appeal was argued in November, 1978, Docket Nos. 77-2426 and 77-2427 (4th Cir.), but had not been decided as of December 20th.

the privity and knowledge of Steuart, it was not "willful", and that Steuart was therefore entitled to limitation of liability to the Government under the Pollution Act, although not to limitation of liability to other claimants under the Limitation of Liability Act:

> The failure of Steuart's managers and superintendents to discover and remedy this defect in the barge amounts to negligence within the privity and knowledge of Steuart . . . There is no evidence, however, that Steuart's failure to recognize and correct the deterioration of one of the deck closures was in any sense willful. The evidence all leads to a finding of ordinary negligence. (435 F.Supp. at 803)

It is manifest that the Court in *Steuart* interpreted "willful" in the ordinary sense of the word, and concluded that to "break" limitation under the Pollution Act, the burden was on the Government to prove an intentional act on the part of Steuart which it knew would probably result in harm—a far higher standard of proof than that required by the Court of Appeals herein.

The alternative definition of "willful misconduct" adopted by the Court of Appeals in this case also conflicts with *American Airlines* v. *Ulen,* 186 F.2d 529, 533 (D.C. Cir. 1949), where it was held that "willful misconduct" under the Warsaw Convention must consist of *a deliberate, knowing and intentional violation of a known duty.* According to the Court:

> One recent federal court decision defines the terms as follows: "*Willful misconduct means a deliberate purpose not to discharge some duty necessary to safety.*" [Circuit Judge Minton in *Rowe* v. *Gatke Corporation,* 7 Cir., 1942, 126 F.2d 61, 66]. This definition squarely fits the facts in the present case.

> The obvious and sole purpose of Civil Air Regulations * * * is safety. It imposed a duty upon all scheduled carriers which appellant *deliberately, knowingly and intentionally violated.* (186 F.2d at 533)

See also Koninklijke Luchtvaart Maatschappij N.V. KLM v. *Tuller,* 292 F.2d 775 (D.C. Cir. 1961), *cert.* denied 368 U.S. 921 (1961), where the court adhered to the definition of "willful misconduct" set forth in *American Airlines, Inc.* v. *Ulen, supra.*

In *Rowe* v. *Gatke Corporation,* 126 F.2d 61, 66 (7th Cir. 1942), *appeal dismissed* 317 U.S. 702, cited in *American Airlines, Inc.* v. *Ulen, supra,* the Court of Appeals for the Seventh Circuit established a definition of willful misconduct in connection with a state regulatory statute, the Indiana Occupational Disease Act:

> *"Willful" means more than intentional and occasional breach of duty. "Willful misconduct" means a deliberate purpose not to discharge some duty necessary to safety. It implies obstinancy, stubborness, set purpose, and conduct that amounts to deliberate bad faith, quasi-criminal in its nature.*

In the present case, by holding that "willful misconduct" may be found by a showing by the Government of proof which permits merely an *inference* of a reckless disregard of the probable consequences of the act, the Court of Appeals for the Second Circuit has fashioned a very broad definition inconsistent with the statutory language, as well with the Congressional intent. Red Star submits that the only correct definition is one that requires proof of *actual* knowledge that injury will probably result from the act. As the Court below held, the Government did *not* carry its

burden of proof in establishing such actual knowledge on the part of Red Star.

The error in the definition of "willful misconduct is compounded by the Court of Appeals' application of it to the facts. After reviewing all of the faults it attributed to Red Star, the Court *explicitly concluded that not a single one, standing alone, constituted willful misconduct.* According to the Court:

> *While any one of the faults of Red Star alone, even within privity, may not constitute "willful misconduct"*, on the entire record the various inactions and gross disregard of the potential harm amount, in our opinion, to willful misconduct within the meaning of the statute. (A-26)

By converting into "willful misconduct" several acts any one of which, standing alone, it held would constitute at most ordinary negligence, the Court below has employed an entirely novel process of synergy never contemplated by Congress and which is seriously in error as a matter of law. Moreover, as will be shown in Point II, *infra,* the error is further compounded by the fact that the various negligent acts the Court concluded had the cumulative effect of "willful misconduct" were not within the "privity and knowledge" of Red Star, as the Pollution Act expressly requires as a conditon to the denial of the right of limitation.

II.

Regardless of what definition of "willful misconduct" is accepted, the right of limitation under the Pollution Act may be denied *only* if the Government can prove that the "willful misconduct was *within the privity and knowledge*"

of the third-party owner of the vessel responsible for the oil spill. 33 U.S.C. § 1321(g). *See* H.R. Rep. No. 91-940, 91st Cong., 2d Sess. 38-39 (1970) (Comm. of Conference). There can be no doubt that Congress intended the phrase "privity and knowledge" to have the same meaning and application as the nearly identical phrase in the Limitation of Liability Act, 46 U.S.C. 183(a), providing that limitation thereunder may be denied if the vessel owner fails to show that the casualty occurred without his "privity and knowledge". It should be stressed, however, that limitation under the Limitation Statute will be denied if there is fault within the privity and knowledge of the owner, whereas under the Pollution Act the Government must prove *"willful negligence or willful misconduct within the privity and knowledge"* of the owner or operator of the vessel responsible for the discharge.

In direct conflict with the express language of the Pollution Act, however, the Court of Appeals disregarded the requirement that the "willful misconduct" depriving the party of his right to limit his liability thereunder must have been within the "privity and knowledge" of Red Star, *i.e.*, it must have been that of a managing officer of Red Star. See *Craig* v. *Continental Ins. Co.*, 141 U.S. 638 (1891), holding that in the case of a corporate owner, the "privity and knowledge" required to deny limitation under the Limitation of Liability Act *"must* be that of the managing officers of the corporation; 3 *Benedict on Admiralty,* 5-14 n.2 (1975).

The Court below explicitly concluded that those faults which it held within Red Star's privity did not fulfill even its own test of "willful misconduct" (A-26). Despite this conclusion, based on the cumulative effect of negligent acts *not* within Red Star's privity and knowledge, the Court of Appeals held that Red Star was not entitled to limitation of liability with respect to the Government's claim.

The Court of Appeals' rationale for disregarding this express requirement is plainly at odds with the Congressional intent underlying the Act. According to the Court:

> Otherwise, it would be difficult to imagine what would be necessary to make a tug company liable for the costs of cleaning a negligent oil spill save an admission of an actual intent to do so, and would extend to the tugboat industry an almost absolute exemption from liability for pollution cleanup costs. (A-26)

This statement ignores the stated policy of the Congress that vessel owners should be entitled to limit the amount of their liability to the Government for pollution clean-up expenses to $100 per ton, except in extraordinary cases. Congress was fully cognizant of its purposes in limiting the liability of vessel owners to insurable amounts, and by doing so, clearly did not intend to grant tug owners "an almost absolute exemption from liability for pollution cleanup costs." As Senator Cooper stated in introducing the Conference Committee bill which was eventually signed into law:

> Consistent with the philosophy of absolute liability, limits of liability are provided. *This is an important provision, which I consider draws a proper balance between the public interest and the ability of private enterprise to respond.* I think it should be pointed out that the provision was adopted only after the most careful consideration and thorough study."[5]

[5] Statement of Senator Cooper, March 24, 1969, in Environmental Protection Agency, *Legal Compilation* 1967 (1973). *See also* State-

(Footnote continued on following page)

In balancing the "public interest" against the "ability of private enterprise to respond", Congress expressly intended that while a vessel owner could be held liable to the Government for its clean-up costs if his employees were negligent, this liability should be limited, even if the negligence might amount to willful negligence or misconduct of such employees.

The importance of this express requirement in the comprehensive liability scheme embodied in the Pollution Act cannot be overstated. The Act and all of its major features, including the requirements for the provision by insurers of certificates of financial responsibility, 33 U.S.C. § 1321(p), are premised on the principle of limitation of liability which can be denied only in the case of a deliberate act by the vessel owner himself, or, in the case of a corporate owner, that of its managing officers, which he or they know will probably result in harm. To disregard the "privity and knowledge" requirement of the Act, as the Court of Appeals has done in the instant case, is to ignore both its express language and its underlying principles.

III.

The Court of Appeals has improperly applied the *Pennsylvania* Rule to deny limitation of Red Star's liability

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(Footnote continued from preceding page)

ment of Representative Cramer, March 25, 1969, in *Id.*, at 1981; Statement of Representative Roth, March 25, 1969, in *Id.* at 1995; *See generally* S. Rep. No. 91-351, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-127, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-940, 91st Cong., 2d Sess. (1970) (Comm. of Conference); S. Rep. No. 92-414, 92d Cong., 2d Sess. (1971); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1236, 92d Cong., 2d Sess. (1972).

under Pollution Act. In *The Pennsylvania,* 86 U.S. 125 (1874), this Court held that where a vessel is guilty of a statutory violation, her owner can escape liability only if he can show that the violation could not have contributed to the casualty. In the present case, the Court of Appeals concluded that Reimer's failure to post a lookout was such a violation, and that under *The Pennsylvania,* Red Star had the burden of showing that this could not have contributed to the grounding. (A-19). Reversing the District Court, the Court of Appeals held that Red Star had failed to carry this burden of proof. (A-19).

Whether or not the Court of Appeals was correct in applying the *Pennsylvania* Rule in determining Red Star's *liability to Pittston,* the Court was plainly in error in applying the Rule in holding Red Star guilty of "willful misconduct" depriving it of *the right to limit its liability to the Government* under the Pollution Act. That Act expressly provides that the burden is *on the Government* to prove that the discharge was caused by "willful misconduct within the privity and knowledge" of the owner of the responsible vessel before the latter may be denied the right to limit. The language of the statute could not be plainer:

> *If the United States can show* that the discharge of oil . . . was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs.

There was no affirmative proof by the Government that the failure to post a lookout was causally related to the grounding. The Court of Appeals simply held that Red Star had failed to carry its burden of proof under *The Pennsylvania* because it did not prove that a lookout would

not have seen Con Hook Light in time to avoid the grounding. According to the Court:

> Even though a lookout did not see the ice stranded buoy, it would be a matter of *pure speculation to say* that a proper lookout would not have seen and reported Con Hook Light. (A-18).

It was likewise speculation for the Court to say that a lookout would in fact have seen Con Hook Light in ample time before the grounding. Indeed, the expert testimony at trial was that Con Hook Light comes into view too late to be of any assistance to northbound vessels such as the OCEAN PRINCE, and Reimer, who was searching for the can buoy south of Con Hook Light, never saw the light until just after the grounding. (B-13).

By applying the *Pennsylvania* Rule, the Court of Appeals erroneously relieved the Government of the burden of proof placed upon it by the plain words of the Pollution Act.

IV.

The Court of Appeals' decision denying Red Star limitation of its liability to Pittston is in direct conflict with *Craig* v. *Continental Ins. Co.,* 141 U.S. 638 (1891), where this Court held that in the case of a corporate shipowner, the "privity and knowledge" required to deny it the right to limit its liability under the Limitation of Liability Act, 46 U.S.C. §183(a), "must be that of the managing officers of the corporation". *See also Coryell* v. *Phipps,* 317 U.S. 406, 410 (1943); *Spencer Kellogg & Sons* v. *Hicks,* 285 U.S. 502 (1932). The Court of Appeals has disregarded this requirement in denying Red Star the right to limit its liability to Pittston.

None of the faults the Court of Appeals has attributed to Red Star can conceivably be considered acts of a "managing officer of the corporation". The "navigational mistakes" charged (A-26) were errors on the part of Reimer which were clearly not within the privity and knowledge of Red Star's management. *See Craig* v. *Continental Ins. Co., supra*; 3 *Benedict on Admiralty* § 42.

The Court of Appeals also placed much emphasis on the failure of the night dispatcher Keenan to advise Kiernan that he was the intended captain, and that Reimer was not experienced in navigating the Hudson. (A-25-26). No case has been found in which a tug dispatcher or similar employee has been held a "managing officer" of a corporate owner, and Red Star submits that there is none. *See* 3 *Benedict on Admiralty* § 42 (1975). Indeed, the evidence was clear that Keenan's responsibilities were so limited that he could not conceivably have such status, and there was no finding by either the District Court or the Court of Appeals itself that he was a "managing officer".

Finally, the Court of Appeals concluded that the failure to post a lookout was within the privity and knowledge of Red Star. But the failure was plainly Reimer's, and his negligence in the navigation and management of the Tug was not within Red Star's privity and knowledge. The Court of Appeals correctly held that a lookout is *not* required at all times, but only "if proper precautions or special circumstances required it". (A-9). Red Star's policy coincided exactly with the standard of care required by the Court of Appeals. The record is plain that Red Star *did* provide a deckhand to act as lookout, whom Reimer chose to send to the galley to get coffee at perhaps the most inopportune time possible. The testimony of Red Star's Vice President of Operations, the only managing officer of the corporation ever referred to in the Court of

Appeals' decision, could not have been clearer: *When the circumstances dictated the need for a lookout, one was to be posted and he was to have no other duties.* At no time did Red Star "condone" a practice of sending a *lookout* for coffee. All that Red Star did "condone" was the practice of sending a *deckhand* to get coffee *only if he was not needed as a lookout.*

Reimer's failure to post a lookout when one was required involved a decision that could be made only on the spot, by one having knowledge of the circumstances. There was of course no opportunity to consult with Red Star's management as the Tug and Barge approached the rock formation on which the stranding occurred. The finding of the Court below was that Red Star had *no actual knowledge* that no lookout was posted, but that there was *constructive* knowledge, and that this was sufficient to deny limitation. It has long been settled by this Court, however, that limitation may be denied *only* if there is *actual* privity and knowledge. *Coryell* v. *Phipps, supra,* 317 U.S. at 410-12; *Deslions* v. *La Compagnie Generale Transatlantique, (La Bourgogne)*, 210 U.S. 95, 122-126 (1908). Indeed, the Court of Appeals for the Second Circuit said it well many years ago in *The 84-H,* 296 F. 427 (1923): "*The privity and knowledge must be actual and not merely constructive.*" In failing to adhere to its own rule in the present case, the Court of Appeals has clearly erred.

V.

The decision below is in direct conflict with that of the Fourth Circuit Court of Appeals in *The Temple Bar,* 137 F.2d 293 (4th Cir. 1943), with respect to the very important question of whether, by placing an otherwise competent navigator in command of a tug and supplying him

with all possible navigational aids, a shipowner has performed his duty of making the vessel seaworthy, if the navigator does not have any experience navigating in the area. This conflict among the Circuits has resulted in great uncertainty in the tugboat and shipping industries as to what standards must be followed in manning vessels.

The Court of Appeals held in this case that the Tug was unseaworthy solely because Reimer had never before served as a navigator on the Hudson. (A-11). The Court so held despite the facts that (a) Reimer held a valid Coast Guard license which entitled him to act as navigator on the trip in question, (b) before the casualty, Reimer had been a tug captain for five years, and had been on board the OCEAN PRINCE for 1½ years, (c) Reimer was well aware of the location of the submerged rocks and knew they were marked by a can buoy which he looked for, (d) the Tug was equipped with charts, the "Coast Pilot", and the Light List for the area in question, and (e) Kiernan, who had 30 years of experience on the Hudson as a tug captain, was on board and available to assist Reimer at any time, regardless of any doubt he may have had as to who was the senior man.

The District Court found that Reimer was competent and the Tug seaworthy, even though, while he had been up and down the River numerous times as a deckhand, Reimer had not previously served as a navigator in the Hudson. The District Court concluded:

> Reimer is a licensed tug captain with several years' experience in tugboats. He had available charts and publications which clearly designated the location of the submerged rocks. Moreover, he was clearly aware of the hazard because he had been searching for the can buoy for a substantial period of time prior to the grounding. A failure to perceive the

> hazard might have been indicative of generalized incompetence which would have created an unseaworthy condition. An inadequate response to a known danger presents an error in navigational judgment and, as such, falls outside the owner's privity and knowledge. (B-22-23)

In so holding, the District Court expressly followed the rule established in *The Temple Bar, supra.* (B-22). There, it was contended that the stranding of the vessel was caused by the master's lack of experience in the area and his ignorance of the prevailing currents. The claimant argued that under *The Lady Pike,* 88 U.S. 1 (1874), a master's lack of familiarity makes his vessel unseaworthy. The Court of Appeals for the Fourth Circuit rejected this contention, stating with reference to *The Lady Pike*:

> . . . [T]he decision cannot be accepted as authority for the broad proposition that it is negligent to put a master in charge of a ship, whatever the voyage, unless he is familiar with all the local conditions he may be expected to encounter. *If, as in the case at bar, a master qualified in other respects, is placed in command, and if he is supplied with charts and publications sufficient to enable a competent man safely to navigate the ship, it is not necessary that he should have prior knowledge of local conditions, and lack of it will not cause the ship to be unseaworthy.* (137 F.2d at 292)

The Court of Appeals herein expressly disagreed with the reasoning of the Fourth Circuit Court of Appeals and held that the Tug was unseaworthy *per se* solely because Reimer, though an otherwise competent and experienced navigator who, with the aid of the charts on board, was well aware of the location of the submerged rocks, had never before navigated the Hudson. (A-11).

In creating this conflict with *The Temple Bar,* the Court of Appeals stated that it was relying upon *The Lady Pike, supra,* where this Court stated with respect to river pilots:

> Ignorance of the danger before them is no sufficient excuse, as the owner appoints the master and is bound to select one of competent skill and knowledge, to transport goods and merchandise shipped on board in safety, which necessarily imposes the obligation to employ a master mariner who knows enough about the route to avoid the known obstructions and to choose the most feasible track for his route. Knowledge of the kind, in river navigation, is peculiarly essential, as the current frequently shifts from one side towards the other, and the track of navigation is often obstructed by snags, sandbars, and shoals, which no degree of skill would enable the mariner or pilot to avoid *without a prior knowledge of their existence.*

The Court of Appeals held in the present case, in conflict with *The Temple Bar,* that *The Lady Pike* required a finding that Reimer was incompetent because of his lack of experience as a navigator on the Hudson. Red Star submits that *The Temple Bar* is correct, and does not conflict with *The Lady Pike.* It was certainly not intended to sound the death knell of that decision, as the Court of Appeals infers in this case. (A-13). Rather, *The Temple Bar* quite plainly and correctly holds that *The Lady Pike* cannot be read so broadly as to require, as the Court herein has now held, that a tug is unseaworthy *per se* if one of her navigators has not previously navigated on the particular route the vessel is taking.

Indeed, the error below is highlighted by the fact that Reimer clearly measured up to the standards outlined in

The Lady Pike. As the District Court found, Reimer was in no sense "ignorant of the danger", but had prior knowledge of the existence and location of the submerged rock formation. The grounding was caused, not by his lack of familiarity with the River, but by an error in judgment on his part, which was not within Red Star's privity and knowledge.

The Court of Appeals has established a standard of care on the part of management that may be impossible to attain. The decision goes far beyond any requirements established by the Coast Guard for the licensing of tugboat navigators—the Coast Guard had in fact issued a license to Reimer entitling him to serve as captain on the Ocean Prince for the trip in question—or by this Court in *The Lady Pike.*

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 842, 901, 902—September Term, 1977.

(Argued May 24, 1978 Decided August 7, 1978.)

Docket Nos. 77-6190, 6195, 6198

In the Matter of the Complaint of TUG OCEAN PRINCE, INC., and RED STAR TOWING & TRANSPORTATION CO., as Owner and Charterer of the Tug "OCEAN PRINCE", for Exoneration from or Limitation of Liability,

Plaintiffs-Third Party Plaintiffs-Appellees-Cross-Appellants,

against

UNITED STATES OF AMERICA,

Third Party Defendant-Appellee.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

against

PITTSTON MARINE TRANSPORT CORP.,

Defendant-Appellee,

TUG OCEAN PRINCE, INC. and RED STAR TOWING & TRANSPORTATION CO.,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge,*
BLUMENFELD, *Senior District Judge,**
MEHRTENS, *Senior District Judge.***

All parties appeal from judgment denying exoneration and granting limitation of liability to owners and charterers of tug push-towing an oil laden barge which struck a charted rock in the Hudson River, dismissing claims of owners and charterers of tug and owner of barge against the United States, and limiting damages recoverable by the United States against owners and charterers of tug for oil pollution cleanup costs.

Reversed in part, affirmed in part, and remanded.

McHUGH, HECKMAN, SMITH & LEONARD, New York, N. Y. *Attorneys for Pittston Marine Transport Corp.*

HEALY & BAILLIE, New York, N. Y., *Attorneys for Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co.*

THOMAS J. CAHILL, United States Attorney; GILBERT S. FLEISCHER, Attorney in Charge Admiralty & Shipping Section, JANIS G. SCHULMEISTERS, Trial Attorney, *Attorneys for United States of America.*

MEHRTENS, *Senior District Judge:*

The oil-laden Barge NEW LONDON, push-towed by the Tug OCEAN PRINCE, struck a charted rock outside the navigable channel in the Hudson River, sustaining damage and causing a considerable oil spill. Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co. (Red Star), the owner and charterer of the Tug OCEAN PRINCE, petitioned for exoneration from or limitation of liability under 46 U.S.C. §183 *et seq.* in which proceeding Pittston Marine Transport Corp. (Pittston) filed claims for damage to the barge and loss of cargo. Red Star thereafter filed a third-party action against the United States of America (the United States), alleging that its fault caused the casualty. The United States counterclaimed against the tug and crossclaimed against the barge for the pollution cleanup expenses. Pittston crossclaimed against the United States for its damages and the United States counterclaimed against Red Star for the money spent for cleanup. The United States also filed a separate action against them for the cleanup costs in the civil pollution penalty under 33 U.S.C. §1321. The actions were consolidated for trial. The trial court denied exoneration but granted limitation to the value of the tug. It further found that Pittston was not responsible for the oil spill and dismissed the United States' action against Pittston. The court also dismissed both Red Star's and Pittston's claims in the third-party action as well as Pittston's counterclaim against the United States in the action it instituted to recover the cleanup costs, limiting the tug's liability for pollution cleanup to $100 per gross ton under the provisions of 33 U.S.C. §1321. Nobody is happy and everybody has appealed.

The court below made detailed findings of fact and conclusions of law. *The Ocean Prince* v. *United States*, 436 F.Supp. 907 (1977). The facts may be capsulated, enlarging upon them as need be in the discussion that follows.

* Sitting by special designation from the District of Connecticut.

** Sitting by special designation from the Southern District of Florida.

The Facts in the Court Below

In examining Pittston's and the United States' contentions that the district court erred in holding that Red Star was entitled to limit its liability, we make plain at the outset that we accept the fact-findings made by the trial court except where they are inconsistent or, in our opinion, clearly erroneous.

The tug OCEAN PRINCE has an overall length of 94.7 feet, a gross tonnage of 198 tons, and her deep draft was about 14 feet. She is pilothouse controlled, equipped with radar, a gyro-compass, a magnetic compass, and a searchlight. She did not have a pelorus or azimuth circle or other equipment with which to take visual bearings. The radar had relative graduations. With the cursor or cross hairs relative bearings could be taken. The tug's deck crew consisted of two pilots, Walter Reimer and John Kiernan, both Coast Guard licensed, and two deckhands, one assigned to each watch. Each pilot and deckhand stood six-hour watches. The deckhands had other duties and were often sent below for coffee, all of which was well known to Red Star's Vice President of Operations.

The tank Barge NEW LONDON, of 1665 gross tons, has an overall length of 295 feet, and was drawing 12 feet. In her stern was a pushing notch where the bow of the tug fits snugly. The tug was secured to the barge with steel cables and synthetic lines. Steering and propulsion were supplied by the tug.

Operating as a unit, the tug and barge were 385 feet long, of 1863 gross tons.

Reimer had been employed by Red Star for about one and one half years while the OCEAN PRINCE operated in southern waters. In southern waters Reimer had acted as her captain and mate, but when the OCEAN PRINCE came north at the beginning of the year Reimer left for vacation.

Kiernan was employed by an associated company as tug captain. He had extensive experience on the Hudson River, but, except for this voyage, had never worked for Red Star. On February 1, 1974 Kiernan joined the OCEAN PRINCE as mate.

On February 2nd the permanent captain of the OCEAN PRINCE left and thereafter Reimer arrived. Red Star intended Kiernan to be captain and Reimer to be mate, but Red Star's dispatcher, who assigned the OCEAN PRINCE to the job, did not communicate this information to Kiernan or to Reimer, and neither had anyone else, nor was the fact that Reimer had never piloted on the Hudson River communicated to Kiernan. As a result, Kiernan and Reimer each assumed that he was the mate and the other the captain. Reimer, although he had no experience on the Hudson River, did not check the navigation aids on board or examine the Light List or the Coast Pilot very carefully.

About one and three-quarters miles north of Bear Mountain Bridge lies a large submerged rock formation on the west side of the channel, which is clearly indicated on the chart and marked in winter months by the unlighted black can buoy "25".

The Light List warns the pilot not to rely on floating aids to navigation; that all buoys should be regarded merely as warnings or guides; that whenever, if possible, a vessel should be navigated by bearings or angles on fixed objects on shore and by soundings rather than reliance on buoys; that the lighted buoy "25" is replaced by an unlighted can buoy from December 15 to April 1; and that the fixed light "27" on Con Hook Island is on a black skeleton tower 46 feet above water.

The Coast Pilot advises pilots that during the ice season aids to navigation are covered or dragged off station by

moving ice; that, however, the river is well marked by lights along the shore and, most important, that with respect to the rock marked by buoy "25", the rock has a depth of seven feet, and with a fair current there is a tendency to set toward the rock; caution is advised.

At about 1800 hours (6:00 P.M.) Red Star's dispatcher advised the OCEAN PRINCE to proceed to Exxon Dock to take the Barge NEW LONDON to Kingston. Nothing was said about who would be the captain or Reimer's lack of experience on the Hudson River. The OCEAN PRINCE proceeded there, was secured to the barge, after which Reimer went below and Kiernan continued on watch. At 2330 hours (11:30 P.M.) Reimer came to the pilothouse and relieved Kiernan of the watch. The tug and barge continued northward up the Hudson River past Peekskill and approached Bear Mountain Bridge. The tide was ebbing. There was ice in the river and visibility was about two miles with snow flurries. The tug was proceeding at a speed of about six knots over the bottom. The radar was operating and a chart for the area was in the wheelhouse. When the tug and barge passed under the bridge, Reimer sent the deckhand down to the galley to get coffee, remaining by himself in the wheelhouse.

Although able to see both shore lines of the river, Reimer began using the tug's searchlight to look for buoy "25" on the lefthand side of the channel. Unable to see it, he reduced the engine speed to "half, maybe less" and continued searching for the buoy. He never saw the light on Con Hook Island ahead, although it was visible from a position off Fort Montgomery or Town of Manitou about 1.5 miles south of the light and one mile south of the point of striking. The deckhand returned to the wheelhouse about the time that the barge struck the rock on her port side and to the left of the navigational channel. Oil escaped

from the damaged cargo tanks, creating a serious pollution problem. Reimer never saw the can buoy. Kiernan came to the wheelhouse shortly after the striking, saw the Con Hook Island light ahead and observed the can buoy on the starboard beam of the tub 50 to 75 feet away. Reimer was very upset and Kiernan took over the wheel. He turned the tug and barge around and headed south to the Dayline Pier. After turning around Kiernan observed the lights on the Bear Mountain Bridge about two miles away.

The Limitation of Liability

The district court held that the casualty resulted from errors of navigation and management on board the tug. not within Red Star's privity and knowledge, and that, therefore, its liability was limited to the value of the tug and her pending freight and that Red Star's liability to the United States was subject to the tonnage limitation contained in 33 U.S.C. §1321(g).

In a limitation proceeding such as this, the burden of proof as to the absence of privity or knowledge is on the petitioners, Red Star. *Coryell* v. *Phipps,* 317 U.S. 406 (1943). It is the owner's duty to use due and proper care to provide a competent master and crew and to see that the ship is seaworthy; any loss occurring by reason of fault or neglect in these particulars is within his privity. *Re Reichert Towing Line,* 251 F.2d 214 (2d Cir.), *cert. denied,* 248 U.S. 565 (1918); *Teeracciano* v. *McAlinden Construction Co.,* 485 F.2d 304 (2d Cir. 1973).

Seaworthiness is a relative term depending upon its application to the type of vessel and the nature of the voyage. The general rule is that the vessel must be staunch, strong, well equipped for the intended voyage and manned by a competent and skillful master of sound judgment and discretion. *The Niagara* v. *Cordes,* 16 U.S. (21 How.) 7 (1859);

The Framlington Court, 69 F.2d 300, 304 (5th Cir.), *cert. denied*, 292 U.S. 651 (1934); *Adams* v. *Bortz*, 279 F. 521 (2d Cir. 1922); *Northern Commercial Co.* v. *Lindblam*, 162 F. 250 (9th Cir. 1908). The burden to prove seaworthiness and the exercise of due diligence to make the ship seaworthy is upon the vessel owner or operator. *Tecracciano* v. *McAlinden Construction Co., supra.* Red Star had a non-delegable duty to provide a qualified master and crew for the intended voyage. *Boudin* v. *Lykes Brothers Steamship Co.*, 348 U.S. 336 (1955); *Petition of the United States*, 178 F.2d 243, 252 (2d Cir. 1949). *See, Admiral Towing Co.* v. *Woolen*, 290 F.2d 641, 646 (9th Cir. 1961); *Navegacion Castro Riva* v. *The M. S. Nordholm*, 178 F. Supp. 736, 741, n.19 (E.D. La. 1959), *aff'd*, 287 F.2d 398 (5th Cir. 1961). If then, the OCEAN PRINCE was manned by an inadequate crew, Red Star's duty as shipowner was breached on either the theory of negligence or that of unseaworthiness. Incompetence of the navigator makes the vessel unseaworthy. *Empire Seafoods, Inc.* v. *Anderson*, 398 F.2d 204 (5th Cir.), *cert. denied*, 393 U.S. 983 (1968).

The more restricted the operation in which a vessel is engaged the greater will be the degree of control which the corporate owner will be required to exercise over master, crew and subordinate shoreside employees. *Avera* v. v. *Florida Towing Co.*, 322 F.2d 155 (5th Cir. 1963); *Admiral Towing Co.* v. *Woolen, supra;* G. Gilmore & C. Black, *The Law of Admiralty* (2d Ed. 1957) at 704.

Red Star knew the conditions that would be encountered on a nighttime voyage from Bayonne, New Jersey to Kingston, New York during the ice season. Specifically, they knew or should have known that the United States Coast Guard during the ice season had removed the lighted buoy usually positioned south of Con Hook and replaced it with an unlighted can buoy; that buoys are likely to be

covered or dragged off station by moving ice; that buoy "25" was located in an area which is susceptible to ice accumulation; and that these conditions result in obscuring of the buoy. Such conditions did in fact exist and required Red Star to exercise such reasonable care and maritime skill as prudent navigators employ in similar circumstances. Red Star knew that Reimer was totally unfamiliar with the Hudson River and knew or should have known that to pilot the tug and barge safely, it was necessary to furnish a competent captain and, if proper precaution or special circumstances required it, a lookout.

The district court held Red Star negligent but found that the casualty occurred without Red Star's privity and knowledge. In reaching its conclusion the district court held that Red Star had exercised the high degree of care required by complying with the customary practice of having at least one of the two pilots with experience on the waters to be traversed aboard, and to be available to assist the other when necessary or requested.

The district court clearly erred in accepting as a proper standard in this case the accepted practice in the tugboat industry of dispatching a tug to an area in which one of the pilots had no experience whatsoever so long as the other pilot on board had experience in the area and that it was customary practice aboard tugboats for Kiernan to stand the watch with Reimer if asked.

The rule which has been supported generally by most of the authorities is that conformity to custom is not in itself the exercise of due care. Custom and usage do not justify negligence. A party cannot by his own continued negligence establish a custom by which he is exempt from liability; nor is legal responsibility for negligence mitigated by the fact that others had also been negligent. Methods employed in any trade, business or profession,

however long continued, cannot avail to establish as safe in law that which is dangerous in fact. *See Annot.*, 77 A.L.R.2d 1327 (1961).

In *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), Judge Learned Hand said:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. (Citations omitted).

In *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 234 F.2d 253, 260 (2d Cir. 1956), Judge Waterman, in an action predicated upon negligence under the Jones Act for unseaworthiness under the general maritime law, stated:

> • • • While the customary practice of the industry is relevant and admissible, the defendant's standard of care in a negligence action is not limited to complying with usual practices in the industry or trade. Wabash R. Co. v. McDaniels, 1883, 107 U.S. 454, 460-461, 2 S.Ct. 932, 27 L.Ed. 605; Poignant v. United States, 2 Cir., 1955, 225 F.2d 595; Uline Ice, Inc. v. Sullivan, 1950, 88 U.S. App. D.C. 104, 187 F.2d 82; The T. J. Hooper, 2 Cir., 1932, 60 F.2d 737.

In *June T., Inc.* v. *King*, 290 F.2d 404, 406 (5th Cir. 1961), the court, in holding that even though it was usual and customary to have a two-man crew, nevertheless the shrimper was unseaworthy because a two-man crew was insufficient, stated:

> • • • What is customary in a trade may be evidence of due care—here the reasonable fitness element on the concept of seaworthiness—but it is not the legal measure of the duty. The T. J. Hooper, 2 Cir., 1932, 60 F.2d 737, 1932 A.M.C. 1175; Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 2 Cir., 1956, 234 F.2d 253, 260, 1956 A.M.C. 1367; Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.S.D.N.Y. 1957, 152 F.Supp. 903, 918, 1957 A.M.C. 1436; 38 Am.Jur., Negligence, §34; Schlichter v. Port Arthur Towing Co., 5 Cir., 1961, 288 F.2d 801.

In *Burgess* v. *M/V Tamano*, 564 F.2d 964, 981 (1st Cir. 1977), the court, in imposing liability upon the owners of a supertanker for the government's cleanup costs, stated:

> • • • It was no sufficient answer that it was customary to enter at night, and that the Coast Guard had not forbidden it. *Texas & Pac. Ry.* v. *Behymer*, 1903, 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905; *The T. J. Hooper*, 2 Cir., 1932, 60 F.2d 737, 740 (L. Hand, J.), *cert. denied*, 287 U.S. 662, 53 S.Ct. 220, 77 L.Ed. 571; Restatement, ante, § 33; Prosser, ante, § 33 . . . .

As competent he might be in southern waters, Reimer, who was totally unfamiliar with Hudson River waters during the ice season, was not competent to take over, as a pilot or tug steerer, a tug and oil-loaded barge with a combined total of over 1800 gross tons. Red Star's management knew of Reimer's lack of experience on the Hudson River, knew of the conditions to be encountered, knew that he would stand night watches, clearly failed in its duty to exercise due diligence and sent out a ship un-

seaworthy because not properly manned under the existing conditions.

Neither was the fact that Kiernan, an experienced pilot, would have taken over the wheel, if asked, a sufficient excuse. Under this concept, if carried far enough, Red Star could excuse itself from liability even though an inexperienced, incompetent deckhand had been at the wheel, so long as he could have called a competent pilot.

In arriving at its conclusion the district court rejected the case of *The Lady Pike,* 88 U.S. (21 Wall.) 1 (1874), and adopted as "modern authority" *The Temple Bar,* 137 F.2d 293 (4th Cir. 1943).

In *The Lady Pike, supra,* the Supreme Court, with respect to pilots, laid down the following rule:

> Ignorance of the danger before them is no sufficient excuse, as the owner appoints the master and is bound to select one of competent skill and knowledge, to transport goods and merchandise shipped on board in safety, which necessarily imposes the obligation to employ a master mariner who knows enough about the route to avoid the known obstructions and to choose the most feasible track for his route. Knowledge of the kind, in river navigation, is peculiarly essential, as the current frequently shift from one side towards the other, and the track of navigation is often obstructed by snags, sandbars, and shoals, which no degree of skill would enable the mariner or pilot to avoid without a prior knowledge of their existence.

The next year in *Atlee* v. *New York Union Packet Company,* 88 U.S. (21 Wall.) 389, 396 (1875), the court stated:

> • • • (T)he pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. • • • He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as . . . sunken rocks . . . All this he must know and remember and avoid . . .

These decisions are still viable insofar as the standards they set for inshore piloting and are applicable here. The district court expressly recognized the difference between inshore piloting and ocean navigation, but erroneously adopted and applied the standards set out in *The Temple Bar, supra,* dealing with an ocean-going vessel on a foreign voyage, which does not set standards for inshore pilots. The standards set out in *The Lady Pike, supra,* and in *Atlee* v. *New York Union Packet Co., supra,* relating to inshore pilots have not lost any of their strength; they are not moribund and their eulogy has not been delivered.

Counsel has not cited, and we cannot find a reported case, where, as here, there was a complete failure by the ship owner to dispatch a vessel without appointing a captain. Because Red Star had a non-delegable duty to provide a qualified captain and crew, it seriously failed in that duty by sending the Ocean Prince on that trip without appointing someone (Kiernan or Reimer) as captain in command.

The district court further found that it was the captain's duty to know the experience and qualifications of the mate, but here we had no captain. Neither Kiernan nor Reimer had been told who was the master. Kiernan had never worked for Red Star before and was not told, nor did he know, of Reimer's total lack of experience on the Hudson, all of which the district court found to be "an unfortunate set of circumstances", creating confusion. Red Star's man-

agement alone was responsible for this "unfortunate set of circumstances." If it had intended Kiernan to be captain, it should at least have told him that he was captain and that Reimer had no experience on the river. Red Star should not have permitted this situation to develop, that is, directing the tug to make up to a loaded oil barge, and to proceed at night through waters that required special knowledge of the conditions that would be met, without clearly defining or advising its personnel as to which one of them had the ultimate responsibility of command. For Red Star to do so was clearly a negligent act on the part of Red Star's management, and Red Star's management was not exercising the character of care required.

The district court further found that "Even without the warning in the Coast Pilot, a mariner familiar with the river would not have relied on the buoy at this time of year under the existing conditions"; that "Reimer was well aware that he was unprepared to navigate under the difficult conditions which were rapidly developing", that "With proper use of radar, Reimer could have gotten a radar range from the Bear Mountain Bridge with reasonable accuracy. With a radar range off Bear Mountain Bridge and a visual bearing on Con Hook Light it would have been possible to construct a danger bearing to keep the vessel off the rock. However, since the Tug, as most tugs, was not equipped with a gyro repeater or a pelorus it was difficult to take accurate visual bearings"; and that "Had Kiernan been brought to the wheel house, it is very likely he would have quickly detected that they were to the west of the channel and that the buoy was obscured by drifting ice."

The grounding of the Barge New London did not occur because of a single separate incident. It was the result of an accumulation of acts, all of which originated with

Red Star's management, resulting in an easily foreseeable casualty. Where, as here, Red Star by prior action or inaction set into motion a chain of circumstances which may be a contributing cause even though not the immediate or proximate cause of a casualty, the right to limitation is properly denied. *Waterman Steamship Corp.* v. *Gay Cotton*, 414 F.2d 724 (9th Cir. 1969). Red Star's actions must be considered as causative when establishing fault in the grounding of the barge, and as such they come within the privity and knowledge of Red Star.

In *Nuccio* v. *Royal Indemnity Co.*, 280 F. Supp. 468, 469 (E.D. La. 1968), a proceeding to recover for injuries sustained when the boat on which libelant was a guest passenger collided into the bank of the bayou, the court stated:

> It is hornbook law that when a moving vessel strikes a stationary object an inference of negligence arises and the owner of the vessel then has the burden of rebutting such inference. This respondent has failed to do.
>
> The defense of limitation of liability is also unavailable to respondent because this accident occurred within the full privity of its assured. When respondent's assured entrusted the operation of the *Pintail* to an inexperienced person, he destroyed any defenses which he might have had relative to limitation of liability.

On appeal, *Nuccio* v. *Royal Indemnity Co.*, 415 F.2d 228, 229 (5th Cir. 1969), the lower court was affirmed with the statement that:

> Once it is determined that Arceneaux was negligent and therefore liable for Nuccio's injuries, Royal's contention that the trial court erred in failing to limit

liability to the value of the *Pintail* becomes frivolous. In order to limit the owner's liability, the injury must occur without his "privity or knowledge." This phrase is often defined as "complicity in the fault that caused the accident." Where the owner's negligent act caused the alleged injury as found by the trial court, clearly all of the requirements of "privity" are satisfied.

The reasoning of that case is equally applicable here where Red Star's management entrusted the operation of the OCEAN PRINCE to an inexperienced pilot.

Accepting as we do all of the district court's consistent fact findings, we nonetheless conclude in the context of the uncontradicted facts of this record that the casualty occurred as a result of negligence and unseaworthiness within the privity and knowledg of Red Star; that the order granting limitation of liability should be vacated; and that the court should have entered an order denying limitation of liability.

The Failure to Post a Lookout

The district court, while finding that "Reimer failed to post a lookout when the conditions were such that the same was required," also found that "There was no proof whatever that a lookout forward could have observed the ice stranded buoy," and then it concluded that "the failure to post a lookout cannot be said to have contributed to the collision." This we find to be clearly erroneous because a lookout of suitable experience and competence, properly stationed, and vigilantly employed in the performance of his duty would have seen and reported the Con Hook Light in ample time to avoid the casualty.

Title 33, U.S.C. §221 reads as follows:

> Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

The importance of a lookout was stated by the Supreme Court in *The Ariadne,* 80 U.S. 475, 478-79 (1861), thus:

> The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. * * * It is the duty of all courts charged with the administration of this branch of our jurisprudence, to give the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.

The lookout rule applies, of course, to tug boats. *The Supply No. 4,* 109 F.2d 101 (2d Cir. 1940). It is also established that the pilot steering a tug and tow is not a proper lookout. *Dwyer Oil Transport Co.* v. *The Edna M. Matton,* 255 F.2d 380 (2d Cir. 1958); *The Supply No. 4, supra; Oil Transfer Corp.* v. *Diesel Tanker F. A. Verdon, Inc.,* 192 F. Supp. 245 (S.D.N.Y. 1960).

Reimer was alone in the wheelhouse some 1750 yards south of the location of the charted rock when he experienced difficulty in locating the buoy. Despite being unable to locate it visually or with the radar, he did not direct the deckhand to serve as a lookout. The uncontradicted evidence shows that Con Hook Light was visible about 0.62 miles or 1300 yards south of the rock marked by

buoy "25". From that point it would have taken the tug and barge 10 to 12 minutes to reach the rock all while the Con Hook Light and the shore line were visible.

The Con Hook Light is on top of a tower 46 feet above mean low water. It is visible at the rock (buoy "25"), is visible off Mystery Point, at Manitou, and is visible further south. The chart shows that there is a straight line of sight from Con Hook Light all the way down to the center of the Bear Mountain Bridge.

This is where the failure to have a proper lookout is important and significant and not his ability or inability to see the buoy. Once Con Hook Light was sighted, a pilot could take bearings forward to that light and aft to Bear Mountain Bridge, establishing a line of position and a danger bearing so that the tug's position on one side would assure the tug and barge being in safe waters, while a position on the other side would clearly indicate a hazardous situation. Reimer had at least 10 minutes and probable more time during which the Con Hook Light was visible, yet he had no lookout and did not notice it himself. Even though a lookout did not see the ice stranded buoy, it would be a matter of pure speculation to say that a proper lookout would not have seen and reported Con Hook Light.

It seems clear that under the circumstances existing the ordinary practice of seamen required the keeping of a proper lookout at that time and place. Of course, in order to take proper precautions Reimer would first have to see Con Hook Light. He did not see it, and there was no lookout to report it, as the person who would have been the lookout was getting coffee. This was the usual practice condoned by Red Star's Vice President of Operations.

The failure to post a lookout when the conditions were such that the same was required was not only negligent

and contrary to good practice, it was also a violation of a statutory duty. Such a violation invokes *The Pennsylvania* rule. When a ship violates a statutory rule intended to prevent casualties "The burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." *The Pennsylvania* v. *Troupe,* 86 U.S. (19 Wall.) 125, 136 (1874); *Ira S. Bushey & Sons, Inc.* v. *United States,* 172 F.2d 447 (2d Cir. 1949). The "Pennsylvania rule" is still alive and well today. That rule's vitality and force were not in any degree affected by *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975), which overruled *The Pennsylvania* only in so far as it abolished the Mutual Fault-Equal Contribution rule and substituted a new rule requiring liability for collision damage to be allocated proportionately to the comparative degree of fault.

In this case we hold that the district court's finding that failure to post a lookout cannot be said to contribute to the casualty is in the light of the uncontradicted facts and *The Pennsylvania* rule clearly erroneous and that Red Star failed to overcome its burden of showing that by all reasonable probabilities its failure to require a lookout did not contribute to the cause of the collision. We further conclude that a finding of lack of privity or knowledge on Red Star's part is also clearly erroneous.

This alone is enough to deny Red Star limitation of liability.

Government's Responsibility for the Grounding

We need not pause long to conclude that the district court properly held that the United States should not be found liable under the suits in *Admiralty Act,* 46 U.S.C.

§§ 741-52. There was substantial evidence from which the district court found that during the ice season the can buoy is the best practical floating aid for the site under present technology; that a fixed tower on the rock, the base of which would be in 7 feet of water, would be damaged or destroyed by ice, and that it cannot be said that the negligence, if any, of the United States in not establishing more effective aids to navigation was the proximate cause of the grounding.

We therefore affirm the district court's dismissal of the claims over against the United States.

Red Star's Liability to the United States for Pollution Cleanup Costs

The district court limited Red Star's liability to the United States, for pollution cleanup costs, to $100 per gross ton of the Tug OCEAN PRINCE, or $19,800.00.

The United States insists that Red Star's actions, as a whole, constitute willful negligence or willful misconduct within its privity and knowledge.

The United States also contends that even if this not be so, the district court should have applied the "flotilla doctrine" and used the combined tonnages of the tug and barge, as a unit, in assessing pollution cleanup damages against Red Star.

If the United States is correct, then Red Star's liability for the cleanup costs would be $186,300.00 instead of $19,800.00.

The district court held that the cause of the grounding was not a fault within the privity and knowledge of Red Star and, therefore, never reached the question of what constituted willful negligence or willful misconduct. Because we hold that the OCEAN PRINCE was unseaworthy at the inception of the voyage and that Red Star was guilty

of negligence within its privity and knowledge, we must decide whether Red Star's actions constituted willful negligence or willful misconduct and, if it did not, whether the "flotilla rule" should be applied.

Increased oil pollution of the seas is a natural consequence of the world's increased dependence on oil to satisfy industrial needs and basic energy requirements. Each year approximately 60% of the world production of oil is transported by sea. About 1/10 of 1% of this amount is lost at sea. This amount is divided between tank cleaning operations wherein "slops" are dumped overboard and accident-related spills.[1] The advent of the supertanker has created the danger of larger oil spills, such as occurred as a result of the strandings of The Torrey Canyon and the Ocean Eagle. Dumping and accidental spilling of oil constitutes a major pollution threat to the water resources of the nation. It can destroy or limit marine life, ruin wild life habitats, kill birds, limit or destroy the recreational value of ocean beaches, lake shores and river stretches, contaminate water supplies and create fire hazards. Congress has repeatedly indicated its high regard for our water quality and, conversely, its disdain for its pollution. *United States* v. *Ira S. Buskey & Sons Inc.*, 346 F. Supp. 145 (D.Vt. 1972).

The first statute specifically dealing with oil discharges was the Oil Pollution Act of 1924 (33 U.S.C. §§ 431-437), intended to protect the nation's coastal waters from vessel discharges. Congress next passed the 1948 Water Pollution Control Act (33 U.S.C. § 466), which was amended in 1956 and 1961. In 1965 Congress enacted the Water Quality Act establishing water quality standards for interstate waters.

1 See Charter, Sutherland & Porricelli Quantitative Estimates on Petroleum to the Oceans (1973), where it is estimated that each year operational discharges account for 1,370,000 tons of oil while vessel accidents account for about 350,000 tons.

The Clean Water Restoration Act of 1966 (33 U.S.C. §466) amended the Oil Pollution Act of 1924.

The 1966 Act was superseded by the Water Quality Improvement Act of 1970 (33 U.S.C. §1161), a more comprehensive Act wherein Congress declared the policy to be "that there should be no discharges of oil into or upon the waters of the contiguous zone" (33 U.S.C. §1321). The 1970 Act, as amended by the Federal Water Pollution Control Act of 1972 (33 U.S.C. §1321), is the law applicable to this case. This Act adopts the same measure of damage as the 1924 Oil Pollution Act; however, the defenses are more limited, reflecting a strict liability rather than a negligent standard.

The 1970 Water Quality Improvement Act, incorporated into and modified by the Federal Water Pollution Control Act of 1972, is a comprehensive plan attempting to expedite oil pollution cleanup and to establish a workable scheme for limiting and distributing liability. As amended, the Act prohibits any discharge of oil or other hazardous substances into or upon the navigable waters of the United States and adjoining shorelines or into or upon waters of the contiguous zone, except where permitted under Article IV of the International Convention for the Prevention of Pollution of the Seas by Oil, as amended, or where permissible by presidential regulation (33 U.S.C. §1321).

Summarized, the Act provides that in cases where a discharge of oil is not permissible under the Act, the owner or operator of the applicable vessel or onshore or offshore facility shall be liable to the United States for cleanup costs, except if the owner or operator proves that the discharge was caused by Act of God, Act of War, negligence by the United States, or an act or omission of a third party whether or not negligent or by any combination of those causes. It provides that "Notwithstanding any other provision of law, liability of vessel owners to the United States for the actual cost of removing oil or hazardous substances discharged is limited to $100 per gross ton or $14,000,000.00, whichever is lesser," and that limitation in the above amounts will be denied where the United States can show that the discharge was the result of "willful negligence or willful misconduct within the privity or knowledge of the owner" (33 U.S.C. §1321(f)(1)). With respect to third party liability it provides that where the owner or operator of a vessel or onshore or offshore facility proves that a discharge was caused by an act or omission of a third party, the third party shall be liable to the United States and contains the same penalties and defenses as set out in subsection (f) dealing with the actual spiller or discharger.

The statute is not a model of clarity. In the absence of clarifying case law or legislative history on point, one can only speculate as to the meaning of the "Notwithstanding any other provision of law" clause. With respect to federal cleanup costs, it is uncertain whether Congress intended the Federal Water Pollution Control Act to supersede the Limitation of Liability Act or whether it intended both Acts to be read together so as to provide the greatest relief to the United States. Because the two statutes serve different purposes and differ substantially on crucial issues, in all probability the United States is limited to recover under the Federal Water Pollution Control Act, which does not deny limitation for cleanup costs unless the discharge is the result of willful negligence or willful misconduct within the privity and knowledge of the owner.

As used in the Water Pollution Prevention and Control Act, 33 U.S.C. §1251 *et seq.*, and specifically as used in section 1321, Oil and Hazardous Substance Liability, the phrases "willful misconduct" and "willful negligence" have not been defined. Counsel have not indicated any cases in which the terms have been explained, and our research has

disclosed none. The phrase "willful misconduct", however, has been defined by this court with reference to cases arising under the Warsaw Convention, 49 Stat. 3000, Article 25(1), which excludes any limitation of liability if the damage is caused by the carrier's willful misconduct.

In those cases arising under the Warsaw Convention, this circuit has established the following criteria for a finding of willful misconduct: an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences. *Pekelis* v. *Transcontinental & Western Air,* 187 F.2d 122 (2d Cir.), *cert. denied,* 341 U.S. 951 (1951). If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences. *Pekelis* v. *Transcontinental & Western Air, supra.* The knowledge required for a finding of willful misconduct is that there must be either actual knowledge that the act, or the failure to act, is necessary in order to avoid danger, or if there is no actual knowledge, then the probability of harm must be so great that failure to take the required action constitutes recklessness. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.,* 346 F.2d 532 (2d Cir. 1965); *Pekelis* v. *Transcontinental & Western Air, supra.*

In this case, the questions are whether Red Star's omissions, specifically its failure to inform Kiernan of Reimer's unfamiliarity with the river, its failure to appoint a captain, and its failure to require a lookout under the circumstances, were done intentionally, and whether Red Star knew such a combination of omissions would likely result in damage; or whether, if Red Star did not have actual knowledge, it should have recognized the probable consequences, and that, therefore, the failure to act constituted a reckless disregard of those probable consequences. We think it did.

With regard to whether the failure to act was intentional, Keenan, Red Star's night dispatcher, knew the facts and determined that the tug was suitable for the voyage. Furthermore, even after the tug had left port, any one of Red Star's dispatchers could have called Kiernan to inform him of Reimer's inexperience on the river. Given that Keenan knew of Reimer's unfamiliarity, that the day dispatcher had told Keenan that Kiernan was to be captain, that a ship-to-shore radio was available to communicate this information, even if Keenan had merely forgotten at the time of assigning the Ocean Prince to the trip, and had said nothing to either Kiernan or Reimer, Keenan's omission and his failure to correct it must be considered intentional. *Koninklijke Luchtvaart Maatschappij N.V. KLM* v. *Tuller,* 292 F.2d 775 (D.C. Cir.), *cert. denied,* 368 U.S. 921 (1961). Additionally, we have previously held (as the lower court expressly found) that a lookout was required under the existing circumstances, and that failure to post a lookout was a violation of a statutory duty. Since Red Star was aware of the practice of sending the deckhand for coffee, failed to take any steps to alter that practice, and knew the absence of a lookout was unsafe under the existing conditions, its failure to require the lookout posted must also be considered intentional. *American Airlines* v. *Ulen,* 186 F.2d 529 (D.C. Cir. 1949).

The circumstances surrounding this trip warrant an inference that Red Star acted in reckless disregard of the probable consequences. Red Star's management failed to designate the captain of the tug and failed to inform Kiernan of Reimer's unfamiliarity with the river. Red Star knew that deckhands were sent below for coffee, thereby eliminating them as a lookout, yet failed to take

any steps to halt this practice. Given the conditions at the time of the accident—the ice along the bank, the possibility of the buoys having been moved by the ice, the darkness, and the ebbing tide—all of which Red Star knew or should have known, Red Star's failure to act allows an inference of a reckless disregard of the probable consequences.

It must be made clear that the determination of willful misconduct does not rest solely because of Reimer's unfamiliarity with the river, *cf. Goepp* v. *American Overseas Airlines,* 281 App. Div. 105, 117 N.Y.S.2d 276 (1952), *aff'd.,* 305 N.Y. 830, 114 N.E.2d 37, *cert. denied,* 346 U.S. 874 (1953), nor does it attach necessarily because of any navigational mistakes, *cf. Grey* v. *American Airlines,* 227 F.2d 282 (2d Cir. 1955), *cert. denied,* 350 U.S. 989 (1956). This case is unlike *Grey* v. *American Airlines, supra,* in which the court found that even if there had been pilot error, that fact, by itself, did not necessarily constitute willful misconduct. It is, rather, the combination of factors which together indicate a probable consequence of damage resulting from several failures to act, and by continuing to fail to act in the face of that probability, that indicates a reckless disregard of the consequences. While any one of the faults of Red Star alone, even within privity, may not constitute "willful misconduct", on the entire record the various inactions and gross disregard of the potential harm amount, in our opinion, to willful misconduct within the meaning of the statute. Otherwise, it would be difficult to imagine what would be necessary to make a tug company liable for the costs of cleaning a negligent oil spill save an admission of an actual intent to do so, and would extend to the tugboat industry an almost absolute exemption from liability for pollution cleanup costs.

In summary, we hold that the order of the district court that Red Star is entitled to limit liability with respect to Pittston's claim and also the United States' claim for pollution cleanup costs should be vacated and that an order be entered denying Red Star the right to such relief; directing the entry of judgment in favor of Pittston and the United States for the amount of their damages; and that the district court's judgment in all other respects be affirmed.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Nos. 74 CIV. 3358 (GLG) AND
75 CIV. 5801 (GLG)

SAME TITLE

[Officially Reported at 436 F. Supp. 907]

September 6, 1977

FINDINGS OF FACT

GOETTEL, District Judge.

1. At all material times Tug Ocean Prince, Inc. was, and still is, a New York corporation and the owner of the Tug Ocean Prince. Red Star Towing & Transportation Company (hereinafter collectively referred to with Tug Ocean Prince, Inc. as "Plaintiffs"), was, and still is, a West Virginia corporation with an office and principal place of business in New York, and at all material times was the charterer of the Tug Ocean Prince, and manned, victualed, supplied and operated said Vessel.

2. The Tug Ocean Prince is a United States documented, steel hulled, diesel driven, single screw, 1,800 horsepower tugboat built in 1958, having an overall length of 94.7

feet, an extreme breadth of 27.1 feet and a deep draft of about 13 to 14 feet. Her registered gross tonnage is 198 tons and her registered net tonnage is 134 tons.

She was at all material times equipped with direct pilothouse engine controls, a gyro compass, a magnetic compass, a Decca radar and a searchlight. Her chart for the area was a 1969 edition. Although a subsequent edition was available, there were no material differences between the charts in the location and characteristics of the relevant aids. Buoy "21" had been renumbered to Buoy "25".

3. Red Star had no written procedure for supplying its tugs with navigational information or material. The ordering of charts was left to the captain without the office having a system to check what charts and other navigational publications were needed. Red Star had no procedure for checking that this material was obtained by the Captains. On the voyage in question, the Ocean Prince was carrying current editions of the Light List and Coast Pilot.

4. Red Star Towing & Transporation Company (hereinafter singly referred to as "Red Star") is engaged in the business of general towage in the coastal and inland waters of the United States, including New York Harbor and its tributaries.

5. Red Star Marine Services, Inc. is a company which at all material times provided "management services" for Red Star, including "operations" such as booking of work, scheduling and dispatching of tugs to accomplish that work, hiring and firing of personnel, and overseeing the total operation of the Red Star fleet which includes the Tug Ocean Prince.

6. Red Star and Red Star Marine Services, Inc. are related companies, and have the same president, Mr. Robert W. Sanders.

7. Walter Kristiansen at all material times was vice-president of operations of Red Star Marine Services, Inc.

8. The Red Star companies are also related to the Bushey shipyard at Brooklyn, New York and the various Bushey companies in the New York Harbor area.

9. Red Star has offices at 500 Fifth Avenue, New York, New York, where its tug dispatchers are located.

10. The dispatchers of another related company, at all material times, were located in the same offices, and used the same radios and frequencies.

11. Captains, Relief Captains, Mates and other crew members serving on Red Star tugs are hired by Red Star Marine Services, Inc. but are paid by Red Star.

12. Red Star Marine Services, Inc. had internal requirements for the hiring of navigators, which included a requirement that Tug Captains and Mates it employed either have or obtain a Coast Guard license for the operation of Red Star tugs as a condition to their employment, which company policy preceded subsequent Coast Guard licensing requirements. In addition, when one of the navigators was unfamiliar with the area the tug was dispatched to, Red Star's policy was that the other navigator have extensive experience in and be familar with the area, and that this man be available to assist the other navigator whenever necessary or if requested by the man on watch.

13. Pittston Marine Transport Corporation (hereinafter "Pittston") is a New York corporation and, at all material times, was engaged in the business of transporting petroleum cargoes by barge in, among other places, New York Harbor and its tributaries. At all material times

Pittston owned, operated, manned, victualed and supplied the tank barge New London, of 1,665 gross and net tons and having overall dimensions of 295 feet in length and 43 feet in breadth. The Barge is equipped with a pushing well or notch at its stern into which the bow of a pushing tug fits, providing motive power and steering control.

14. The United States of America (hereinafter the "Government") is a sovereign which, under the auspices of the Coast Guard, establishes, maintains and operates an aids to navigation system on the entire length of the Hudson River in the State of New York. It does so under statutory authority to serve, *inter alia,* the needs of the commerce of the United States. (14 U.S.C. § 81).

15. On February 2 and 3, 1974, the Tug Ocean Prince carried a full crew of six men including two United States Coast Guard licensed (for uninspected towing vessels not more than 200 miles off-shore) navigators, John Kiernan and Walter Reimer, two deckhands, an engineer and a cook.

16. At all relevant times, Mate Reimer held a valid license issued by the United States Coast Guard which gave him authority to serve as operator of uninspected towing vessels upon the inland waters of the United States, including the Hudson River. Reimer had been a Tug Captain for five years, and was qualified generally to serve as a Tug Captain, although he had never before navigated the Hudson River. He had served as a deckhand on tankers on the Hudson River briefly some six years earlier. He worked for Red Star in the capacity of Captain, Relief Captain and Mate, principally on board the Ocean Prince, for a period of one and one-half (1½) years before the voyage in question.

17. Kiernan was also licensed by the Coast Guard and had extensive experience as a Tugboat Captain on the Hudson River which spanned a period of more than 30 years. He was employed by an associated company as a Tug Captain, but was temporarily assigned to Red Star to fill a vacancy on the Tug Ocean Prince and went on board on February 1, 1974.

18. During the voyage in question, Kiernan and Reimer stood alternating six hour watches, with Kiernan standing the 6:00 to 12:00 watches in the morning and evening and Reimer standing the 12:00 to 6:00 watches. One deckhand was assigned to each watch. The Captain or Mate of the watch did the steering and navigating. The deckhand performed various chores, such as line handling, general maintenance on board the tug, and, if requested by the Captain or Mate, lookout duties, steering under the Captain's or Mate's supervision, and getting coffee, all of which were well known to Red Star's vice-president of operations.

19. Prior to the voyage in question, the Tug Ocean Prince had operated in southern waters, in Georgia, Florida, Texas and Louisiana for over a year. During December of 1973 and January of 1974, it operated in and about New York but Reimer was on vacation at that time. He rejoined the Tug in New York on February 2, 1974 at the Bushey shipyard in Brooklyn. Kiernan was already on board. Kiernan had never met Reimer before February 2, 1974, but knew that he was regularly assigned to the Ocean Prince. He was not advised and was unaware of Reimer's lack of familiarity with the Hudson River.

20. While the plaintiffs knew that Reimer lacked familiarity with the Hudson when he rejoined the Ocean Prince on February 2, it was assumed that this lack of

experience would be discussed between Reimer and Kiernan when they met on the vessel.

21. Red Star's Personnel Department was responsible for designating the Captain of the Vessel. Red Star intended Kiernan would be Captain. Kiernan indicated doubt in his own mind that he was Captain, but he took certain steps which were appropriately done by the Captain. It is the Captain's duty to know the experience and qualifications of the Mate.

22. On Friday, February 1, 1974, Pittston phoned in an order to Red Star, advising that it would need a tug to tow its Barge New London to Kingston, New York sometime during the weekend. The order was entered on a job order card, which was given to the tug dispatcher's office. In response to Pittston's order, the dispatcher, Philip Keenan, decided to assign the Tug Ocean Prince to do the job, and did so at 1800 hours on February 2nd. Keenan did not discuss with Kiernan or Reimer who was to be Captain and who the Mate.

23. Kiernan was aware of the make-up of the pilothouse crew on the Ocean Prince on February 2nd, and had been told by the day dispatcher, Robert Fitch, that Kiernan was Captain and Reimer was Mate. Keenan was aware of Reimer's lack of experience as a navigator on the Hudson. He decided, however, that the Ocean Prince would be suitable for the voyage since Kiernan, who had extensive experience as a tug navigator on the Hudson River, was on board and would be available to assist Reimer if necessary. He also assumed Reimer's lack of experience on the Hudson River would be discussed between Kiernan and Reimer. The dispatcher's decision to assign the Ocean Prince to the New London job was in

accordance with accepted practice in the tugboat industry of dispatching a tug to an area one of the navigators had not navigated before so long as the other navigator on board has experience in the area.

24. From the Bushey shipyard the Ocean Prince, with Kiernan on watch, proceeded to Esso dock in Bayonne, New Jersey, and made up to the loaded Barge New London. Reimer, who was offwatch, nevertheless assisted the deckhands in making up the tow, and then went below when the Tug and Barge left on the voyage to Kingston, New York.

25. The New London was taken in tow forward of the Ocean Prince in push-tow fashion with the bow of the Tug snuggly secured in the Barge's stern notch with steel cables and several parts of synthetic lines. The overall length of both Vessels was about 385 feet, with steering and propulsion being supplied by the Tug. Both Vessels had a combined gross tonnage of 1,863. The Barge had a draft of about 12 feet. In its loaded condition, the Barge had only two feet freeboard and the view ahead from the Tug's pilothouse was unobstructed.

26. John Kiernan was in charge of the navigation during the first leg of the voyage which commenced at 1915 hours. At 2330 hours, Mate Walter Reimer came to the pilothouse of the Tug and relieved Captain Kiernan of the watch. Kiernan remained with Reimer for about 15 minutes, and then retired without any discussion of navigation on the river. The Tug and her Tow were approaching Haverstraw, New York at the time. The Tug, with Reimer now in charge of navigation, continued the trip northbound past Peekskill, New York and through Bear Mountain Bridge. At about this time, Reimer sent his

deckhand to the galley to get coffee, leaving Reimer alone in the wheelhouse.

Reimer did not ask Kiernan to stand the watch for him, athough Kiernan would have if asked. This is customary practice aboard towboats. At all relevant times the tide was ebbing, there was ice in the river, and visibility was two miles with snow flurries. The Tug was making good a speed of about 6 knots over the bottom (the Vessels were proceeding against the current). At this time the Tug's radar was operating and in use. A navigation chart for the area was open and in use. Reimer was able to see both shorelines of the river to port and starboard and was also able to see over the full length of the Barge and a safe distance ahead. He was using his radar from time to time to confirm his visual sightings and to locate aids to navigation and other points of reference ahead. At all times the Tug's radar, steering system and engine controls were operating properly.

27. Reimer had not attended any navigation school and never had any formal training in the use of the radar, but was familiar with its operation.

28. The river north of the Bear Mountain Bridge is bounded on both sides by mountains. There was ice flowing on the river with heavy accumulations along parts of the shorelines.

Dead ahead of the Bear Mountain Bridge, west of the navigable channel, approximately one and three-quarter miles north of the Bridge is an obstruction consisting of a pinnacle rock or rocky area, the apex of which is 7 feet below the mean low water line and not visible to vessels in navigation. It is located east of a wide shoal area along the west shore which also is not visible from the

surface. The rock obstruction and shoal area west of it projects almost 400 yards into the river from its westerly shore.

About 600 to 800 yards north of the rock is lighted beacon #27 located on the easterly shore of Con Hook Island. The light is 46 feet above the water according to the Light List and is visible to a tug from the town of Manitou about 1.3 miles south.

The River is 800 yards wide off Mystery Point, and narrows to 450 yards off Con Hook Island. The channel east of the rock described above, which is located between Mystery Point and Con Hook Island, is about 500 yards wide. The river depth in this area varies between 35 feet and 127 feet.

29. The rock presents a dangerous hazard and obstruction to navigators in the Hudson River, apparent on the chart and well known to mariners familiar with the waters and to the Coast Guard.

30. The obstruction is marked by the "25" lighted buoy, which was established and is maintained and operated by the Coast Guard for the purpose of marking the rocky obstruction near the channel. The buoy also marks the westerly extreme of the navigable channel and a bend in the river. The "25" light buoy is replaced by the Coast Guard annually in December at the commencement of the ice season by an unlighted second class black can buoy. The can buoy was in use on February 3, 1974. This change is noted in the Light List.

31. Reimer knew of the existence of the buoy on the chart and the obstruction it designated.

32. As the Tug and her Tow passed abeam Mystery Point, Reimer did not locate the "25" can buoy either visually or on the radar. Because the said buoy marks a dangerous obstruction as well as a bend in the channel, Reimer reduced engine speed, turned on the Tug's powerful spotlight to illuminate the area ahead, and continued to search for the buoy visually and by radar.

33. Shortly afterwards, at about 0130 on February 3, 1974, the Barge struck the rock on its port bow resulting in damage to the Barge's forepeak and # 1 and 2 port side cargo compartments. After impact, Reimer sighted the buoy to the starboard partially visible in the ice near the Vessel's wake. He assumed that the Barge and the Tug in making the turn to starboard after the incident had freed the buoy from the ice.

34. The buoy was obscured by ice and was not seen by Reimer as the Tug and Tow approached it. The ice flow and ice accumulation along the shorelines including north of Mystery Point on the easterly shore partially obscured the image of the shoreline both to the eye and on radar.

35. Immediately after the casualty Kiernan was summoned and return to the pilothouse. He saw the lighted tower of Con Hook Island ahead and the "25" black can buoy about 50-75 feet off the starboard beam of the Tug. The Vessels were still on a northerly heading at the time. After turning around, the lights on the Bear Mountain Bridge about 2 miles south of the Tug's position were also visible. Kiernan brought the Tug and Barge to the Day Line Pier south of the casualty site where they remained until the New London was partially lightened into another barge later in the day.

36. The grounding of the Barge New London resulted, in part, from Reimer's lack of knowledge of local landmarks and experience on the Hudson River.

37. Reimer did not examine the Light List or the Coast Pilot very carefully because he was unfamiliar with the warning therein not to rely solely on buoys and the warning that ice covers the buoys in this area during the winter.

38. Reimer failed to post a lookout when conditions were such that same was required.

39. A navigator who is about to enter strange waters should familiarize himself with the applicable charts, the Light List and the Coast Pilot.

40. The Light List contains a number of warnings to the navigator including the following:

> "It is imprudent for a navigator to rely on floating aids to navigation to always maintain their charted position and to constantly and unerringly display their advertised characteristics. The obstacles to perfect performance are of such magnitude that complete reliability is manifestly impossible to achieve. Buoys are liable to be carried away, shifted, capsized, or sunk as the result of storms, ice conditions, collisions, or other accidents.
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> "All buoys should, therefore, be regarded as warnings or guides and not as infallible navigation marks; especially those located in exposed positions. Whenever possible, a ship should be navigated by bearings or angles on fixed objects on shore and by soundings rather by reliance on buoys."

41. The Light List also states that the lighted buoy "25" (Aid, No. 1874) is "replaced by an unlighted can from Dec. 15 to April 1." It also shows that the fixed light No. 27 on Con Hook Island is on a black skeleton tower, the top of which is 46 feet above water.

42. With respect to the ice on the Hudson, the Coast Pilot states:

> "The ice season usually starts in early January and ends in mid-March. Normally shipping is affected most seriously in the Hudson River between Tappan Zee and Albany. In addition to the problem of getting through the ice, aids to navigation are covered or dragged off station by moving ice. Buoys are removed from the Hudson River during the ice season then reset in late March when the ice clears. However, the river is well marked by lights along the shore." (p. 235).

43. The rock obstruction marked by the "25" can buoy is located in an area which is susceptible to ice accumulation on the ebb tide because an "eddy" is created south of Con Hook Island which results in ice buildup. On the ebb tide, ice accumulation north of Mystery Point on the east shore, directly across the channel from the rock, also occurs. These conditions are known to the Coast Guard and, on occasion, result in the obscuring of the buoy on the west and a distortion of the shoreline on the east.

44. With respect to Con Hook Island, the Coast Pilot makes the following observation:

> "A rock, with a depth of 7 feet over it and marked by a lighted buoy, is about 0.3 mile southward of Con Hook. When descending the river, particularly

> with a fair current, there is a tendency to set toward the rock; caution is advised."

45. At no time prior to the grounding did Mate Reimer see the flashing light on Con Hook Island, north of the can buoy "25".

46. The proximate and predominate causes of the grounding were errors in navigation. These errors in turn were the result of an error in management, whereby a navigator inexperienced with the waters was given no assistance from an experienced navigator then on board in traversing a portion of the river that was dangerous under the circumstances then existing.

47. With proper use of radar, Reimer could have gotten a radar range from the Bear Mountain Bridge with reasonable accuracy. With a radar range off Bear Mountain Bridge and a visual bearing on Con Hook Light it would have been possible to construct a danger bearing to keep the Vessel off the rock. However, since the Tug, as most tugs, was not equipped with a gyro repeater or a pelorus it was difficult to take accurate visual bearings.

48. The obscuring of the buoy by ice contributed to the grounding in that if the buoy had been visible it would have indicated to Reimer he was off course and to the west of the channel.

49. The casualty involving the New London was the third grounding at the same location involving similar circumstances during the prior 20 years. One year before the grounding of the New London, on February 26, 1973, the loaded gasoline Barge George T. Tilton, while being push-towed by the Tug Bart Turecamo, struck the rock marked

by the "25" black can buoy, causing damage to the Barge and pollution. Coast Guard records show the buoy was reported to be under the ice at the time of the grounding.

50. In January, 1969, the Coast Guard Cutter Sassafrass went aground on the same rock due to a navigational error with the buoy in plain view.

51. In December, 1963, the Coast Guard Cutter Sauk went around at the same location. In this case, it was reported to the Coast Guard that the can buoy in question was under the ice. In investigating the incident, the Coast Guard learned that several other casualties at the same rock preceded the Sauk grounding, although those incidents occurred in the 1920's and 1930's and the conditions existing therein were not developed.

52. Similarly, in January, 1976, the Barge Robert L. Poling, while in tow of the Tug Joan Moran went aground on the same rock. Coast Guard records show that the buoy was reported to be almost completely submerged under the ice at the time of the grounding.

53. During the following winter a major oil spill occurred at the same location, but the facts of that incident were not developed at trial.

54. The can buoy is the best practical floating aid for the site, available under present technology. A fixed tower on the rock, the base of which would be in 7 feet of water, would be damaged or destroyed by ice.

55. In light of the difficulty in keeping this floating aid to navigation visible during the winter season, there were available other navigational aids which could have been

established on land which would better aid the mariner in staying in the channel.

56. The Coast Guard has not established any ranges or lights on the eastern shore in the immediate area approaching can buoy "25".

57. The Government publication of Waterborne Commerce of the United States shows the following with respect to the number of trips passing the Con Hook area:

Vessels and tug and barge flotillas travelling between Upper Bay, New York Harbor and Waterford, New York

	Up Bound	*Down Bound*
1971	70,586	73,081
1972	57,779	59,378
1973	61,741	62,468
1974	55,578	55,306
Total 4 years	245,684	250,233

Of these 118,435 were upbound tug and barge flotillas and 166,133 were down bound tug and barge flotillas with drafts of 18 feet or less.

58. As a result of the New London striking the rock, oil leaked from the Barge into the river. Notice of violation was given to Pittston on August 27, 1974; written response was submitted by Pittston and a hearing was held on September 26th; thereafter a civil penalty of $5,000.00 was assessed and notice of Pittston's right to appeal the penalty was given to Pittston. Pittston appealed the assessed penalty. The Commandant of the Coast Guard denied the appeal.

Opinion

To summarize the major events giving rise to this litigation, on February 3, 1973, the barge New London, loaded with oil and in the tow of the Tug Ocean Prince, ran aground on a submerged rock formation in the Hudson River. The buoy, placed by the Coast Guard to mark the obstruction, was apparently obscured by ice. The impact caused the New London to leak oil, fouling the river. The Government undertook the cleanup operation. This sequence of events raises some difficult questions of maritime liability and novel issues of interpretation of the Water Quality Improvement Act of 1970.[1]

Tug Ocean Prince, Inc., as owner, and Red Star Towing & Transportation Company, as charterer of the Tug Ocean Prince, seek exoneration from liability on the ground that the accident was caused by the Government's failure to maintain adequate aids to navigation. (They are referred to hereafter simply as "Plaintiffs"). Alternatively, they seek to have their liability limited to the value of the tug, claiming that the grounding resulted from the cause outside their privity and knowledge. Claimant Pittston seeks to recover the value of all the oil lost from its barge either from the plaintiffs or from the Government. The Government seeks the substantial costs of the oil pollution cleanup from the other parties and a civil penalty from Pittston. Pittston, in turn, seeks indemnity from the plaintiffs for any liability it may have to the Government because of the oil spill.

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[1] 33 U.S.C.A. § 1151 *et seq.*, (Supp. 1977). It is conceded that all claims fall within the admiralty jurisdiction of this court. Fed.R. Civ.Proc. 9(h) and arise under 33 U.S.C.A. § 1321 (Supp. 1977) 46 U.S.C. § 183 *et seq.* and 46 U.S.C. § 742 (1970).

The trial was bifurcated and issues concerning damages reserved for later consideration. The liability issues will be considered separately.

Plaintiff's Claim for Exoneration or Limitation of Liability

The grounding of the barge New London was caused by a grave error in navigation by the Mate Reimer. Unfamiliar with the locale, deceived by ice build-up along the shore, he allowed the tow to stray to the west of the channel while he concentrated on attempting to locate a buoy which had apparently become obscured by drifting ice floes. His concentration on locating the buoy was ill adivsed in light of the fact, clearly set forth in the *Coast Pilot,* that buoys in this area (the Hudson River between Tappan Zee and Albany) get covered and moved off station at that time of year by moving ice. Even without the warning in the Coast Pilot, a mariner familiar with the river would not have relied on the buoy at this time of year under the existing conditions.

[1] While the plaintiffs contend that the inability to locate the buoy was the proximate cause of the grounding, it is clear that the errors of navigation were the proximate cause. The obscured buoy was merely a "but for" factor which had it been visible might have corrected the navigational errors. It cannot be said, therefore, that inability to use the aid to navigation was the proximate cause of the incident. *American Smelting & Refining Co.* v. *S. S. Irish Spruce,* 548 F.2d 56 (2d Cir. 1977). Because the accident was not inevitable, but was instead due to negligence, plaintiffs are not entitled to exoneration from liability. *The Grace Girdler,* 74 U.S. 196, (7 Wall.) 441, 18 L.Ed. 790 (1868); *The Jumna,* 149 F. 171 (2d Cir. 1906). Whether the plaintiffs are entitled to indemnity from the

Government under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52, because of its failure to provide a more reliable aid to navigation, will be considered subsequently.

Having concluded that plaintiffs are not entitled to exoneration from liability, we turn to the related question of whether plaintiffs are nevertheless entitled to limit their liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 183 *et seq.*

The operation of tug boats differs in several material respects from that of ocean going vessels. Because tugs are kept in operation so steadily and the watch standers work such long hours (twelve a day) it is necessary to have two complete sets of crews changing every two weeks, as well as alternates for vacation periods. The crew ordinarily includes two watchstanders, a Captain and a Mate, who alternate six hour watches. While on watch they usually not only command and navigate the tug but also serve as helmsmen "steering" the vessel. Necessarily this limits the amount of instrument navigation and plotting of position possible. For this reason such tugs are not usually equipped with gyro repeaters or peloruses for taking positions. Navigation is done by sight of eye, piloting from known landmarks and aids to navigation. Consequently, intimate familiarity with the waters and hazards is far more important than in ocean navigation. An unfamiliar helmsman requires assistance from an experienced one. It is the responsibility of the Captain to see that the inexperienced navigator (who could be himself) gets such assistance. This responsibility, along with certain administrative chores, is one of the few distinguishing factors between the duties of a Captain and those of a Mate.

Plaintiffs appreciated this factor in assigning a crew to the Ocean Prince, but an unfortunate set of circumstances created unforeseen confusion relating to which of the watchstanders was to assume the position of Captain. Much of the uncertainty stemmed from the fact that Reimer, one of the watchstanders on the night in question, had been a regular pilothouse watch stander aboard the Ocean Prince. He had served as both Mate and Captain when the vessel was stationed in the South. After Reimer had left for an extended vacation, the vessel was brought to New York. Reimer had no experience in piloting the Hudson.

The day before Reimer returned to the Ocean Prince, the Mate then aboard took leave. Needing an experienced man, plaintiffs called upon an associated company to supply a suitable person. It sent John Kiernan, a tugboat captain with 30 years experience on the Hudson River. When Kiernan came aboard on February 1, 1974, the preceding Captain was still there, so Kiernan started as Mate. The next day Reimer rejoined the vessel and the Captain left. Kiernan knew that Reimer was a full-time employee of plaintiff, regularly assigned to the vessel, and qualified to act as its Captain. He did not know that Reimer had not been aboard the vessel during the couple of months it had been operating on the Hudson or that he had *never* navigated the Hudson on any vessel.

The vessel commenced the voyage in question shortly after Reimer came on board and, during the half day preceding the grounding, the two had only two brief discussions. Kiernan contends that, since he was only a replacement, and it was Reimer's regular vessel, he believed Reimer was the Captain. Kiernan, however, occupied the Captain's cabin, stood the watch traditionally taken by the Captain and performed certain administrative tasks which were the Captain's responsibility. (Kiernan maintains that he was forced to assume these tasks after the

grounding due to Reimer's extremely upset emotional state). While Kiernan vaguely claims he alerted Reimer when the watch changed to the general navigational situation ahead, his testimony in this regard was not credible, particularly in light of his professed lack of knowledge of Reimer's unfamiliarity with the river.

It remains a mystery why Reimer did not seek assistance as navigation became progressively more difficult due to the treacherous river conditions. (The issue could not be explored because Reimer, who is no longer in plaintiff's employ, was beyond the subpoena power of the court and did not testify at trial.) His evidence was offered through two lengthy depositions, but in neither of these did any of the counsel explore his motivation in proceeding alone at night up a strong ice-choked river, while aware that he was not picking up the next aid to navigation along the route. One possible answer lies in his having sent his deckhand down to the galley to make coffee prior to the grounding. (He returned, apparently just about the moment of the grounding.) Had the deckhand been available, he could have taken the wheel while a radar range was taken, or been sent forward as a lookout, or, as the best course, been sent to get Kiernan out of his bunk. Had Kiernan been brought to the wheel house, it is very likely he would have quickly detected that they were to the west of the channel and that the buoy was obscured by drifting ice. The question remains whether Reimer's error in judgment is attributable to plaintiff. If so, it is a factor within plaintiff's "privity or knowledge" and a ground for denying limitation of liability under the Limitation of Liability Act, 46 U.S.C. § 183 *et seq.*

Limitation of Liability

The claimant and the Government maintain that limitation should be denied because Reimer's inexperience rendered the vessel unseaworthy. They contend that plaintiff's failure to post a lookout violated Title 33 U.S.C. § 221. They also claim that plaintiffs had failed to provide proper charts aboard the tug. These contentions will be discussed in order.

[2] The burden is clearly upon plaintiffs, in a proceeding under Title 46 U.S.C. § 183, to establish their own lack of privity or knowledge in order to limit their liability. *Coryell* v. *Phipps,* 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943). In *Spencer Kellogg & Sons, Inc.* v. *Hicks,* 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932), the Supreme Court, while denying limitation in that case, nevertheless distinguished situations in which an "emergency must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment." *Id.* at 511-12, 52 S.Ct. at 453. Plaintiffs claim that the collision at issue here presented just such an emergency and contend that it is questionable whether there were any preventative measures which could have been taken to avoid the accident.

Claimants and the Government maintain that Reimer's general unfamiliarity with the Hudson, rather than a specific error of navigational judgment, was the direct cause of the accident. Following this line of argument, they contend that his inexperience created a condition of unseaworthiness which was within the privity and knowledge of plaintiffs. While this view finds support in a

nineteenth century case, *The Lady Pike,* 88 U.S. 1, 21 Wall. 1, 22 L.Ed. 499 (1874), modern authority has rejected it. In *The Temple Bar,* 137 F.2d 293 (4th Cir. 1943) the court stated:

> "[T]he decision [*The Lady Pike*] cannot be accepted as authority for the broad proposition that it is negligent to put a master in charge of a ship, whatever the voyage, unless he is familiar with all the local conditions he may be expected to encounter. If, as in the case at bar, a master, qualified in other respects, is placed in command, and if he is supplied with charts and publications sufficient to enable a competent man safely to navigate the ship, it is not necessary that he should have prior knowledge of local conditions; and lack of it will not cause the ship to be unseaworthy."

Id. at 297.

It is clear that the court did not base its finding of the Master's competence on his familiarity with the assigned route. The court required, instead, that the Master be qualified in other respects (not specified) and that owner stock the ship with relevant charts and navigational publications.

[3] Plaintiffs maintain that they have fulfilled these conditions. Reimer is a licensed tug captain with several years' experience in tugboats. He had available charts and publications which clearly designated the location of the submerged rocks. Moreover, he was clearly aware of the hazard because he had been searching for the can buoy for a substantial period prior to the grounding. A failure to perceive the hazard might have been indicative of generalized incomptence which would have created an unseaworthy condition. An inadequate response to a known

danger presents an error in navigational judgment and, as such, falls outside the owner's privity and knowledge. As stated by a definitive treatise in the field:

> "The navigation of the vessel is under the absolute control of her master . . . and no case has been found where a shipowner, individual or corporate, has been denied limitation because of a liability arising out of an error of management or of navigation on a voyage committed by an employee whom the owner was warranted in believing to be competent with knowledge of his duties."

3 *Benedict on Admiralty* § 42 at 5-25 (6th ed. 1975).

Defendant also argues that plaintiffs failed to provide proper charts aboard the tug. Reimer denied this assertion in his depositions and claimed that he had referred to both a chart of the Hudson which designated the location of the rock and the Coastal Pilot and Light List. The Coastal Pilot and Light List state that during the winter, can buoys become submerged in the ice and cannot be seen. It appears that Reimer was *not* aware of this condition. But this was due to his own negligence in not referring to the manual, rather than the owner's negligence in not providing it. Since the materials were on board, it is clear that the owner's duty was satisfied. The question is whether the equipment on board was "reasonably fit under the circumstances":

> "Neither the absence of an additional watch officer nor the location of the rudder angle indicator involved negligence or rendered the vessel unseaworthy. Although the presence of an additional officer or the relocation of the indicator might have reduced the possibility of collision, that is not the standard by which we are to determine whether Farrell [the

owner] is entitled to limitation. Rather, we must ask whether the procedures and equipment utilized rendered the vessel *reasonably* fit under the circumstances . . . the vessel as equipped was reasonably capable of performing the intended mission *if properly operated. The accident resulted from lack of care and failure to exercise proper procedures by those on the bridge.* For this Farrell is liable, but it is also entitled to limit." (emphasis added; footnote omitted.)

Farrell Lines, Inc. v. *Jones,* 530 F.2d 7 (5th Cir. 1976) at 12-13. *See also United States* v. *Sandra & Dennis Fishing Corp.,* 372 F.2d 189 (1st Cir. 1967).

Defendants also contend that there existed a violation of Title 33 U.S.C. § 221 which provides in pertinent part:

> "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of . . . any neglect to keep a proper lookout. . . ."

Mate Reimer was alone in the wheelhouse at the time of the casualty since he had sent the deckhand, Hebert, below to make coffee.

The parties appear to have assumed, with some support from precedent (*see Dwyer Oil Transport Co.* v. *The Edna M. Matton,* 255 F.2d 380 (2d Cir. 1958); *The Supply No. 4 (The Dalzellea),* 109 F.2d 101 (2d Cir. 1940)) that there is no compliance with the statute where a tug master simultaneously serves as a lookout. It seems somewhat unreasonable to require a small vessel running in uncongested waters to maintain both a pilot and a lookout at all times. In fact, one court in a case involving a tugboat stated the rule requiring a separate lookout was limited to

large vessels. In other instances, a court should weigh "the size of the vessel and the opportunity of the navigator to have a full view of the sea." *Anthony* v. *International Paper Co.,* 289 F.2d 574, 580 (4th Cir. 1961). It is unclear whether the law of this Circuit requires a tug to have a lookout at all times or only when conditions of navigation require it. *Poling Russell, Inc.* v. *United States,* 196 F.2d 939 (2d Cir. 1952).

[4] Assuming, arguendo, that the law of this Circuit requires the posting of a separate lookout on a tug at all times, a violation would then be established and the *Pennsylvania* rule, 86 U.S. 125, 19 Wall. 125, 22 L.Ed. 148 (1874) would come into play with the effect that the owner must prove that the violation could not have contributed to the casualty in any way. *See Ira S. Bushey & Sons* v. *United States,* 172 F.2d 447 (2d Cir. 1949). This is not, however, an unbearable burden. *Dwyer Oil Transport Co.* v. *The Edna M. Matton, supra* at 382; *National Bulk Carrier* v. *United States,* 183 F.2d 405 (2d Cir.), *cert. denied,* 340 U.S. 865, 71 S.Ct. 89, 95 L.Ed. 631 (1950).

[5] There was no proof whatever that a lookout forward could have observed the ice stranded buoy. The buoy, according to the evidence, was not visible until freed from the ice by the wake of the passing tug. Indeed, as indicated earlier, had the deckhand been in the wheelhouse, he would have been more useful taking the wheel and freeing Reimer to either take navigational fixes or call Kiernan, the experienced pilot. Therefore, the failure to post a lookout cannot be said to have contributed to the collision.

[6] Finally, we have the question concerning the plaintiff's responsibility for the alleged confusion as to who was to be the Captain of the vessel. Kiernan testified that had he known he was the Captain, he would have assured

himself that Reimer was familiar with the river before allowing him to take the wheel under the conditions. Again, errors in management aboard the vessel may not be imputed to the owners so as to deny limitation. *South Carolina Highway Dep't* v. *Jacksonville Shipyards, Inc.*, 1976 A.M.C. 456 (S.D.Ga. 1975); *see also New York Marine No. 10, (The C. F. Coughlin)*, 109 F.2d 564, 565 (2d Cir. 1940); *Petition of Tracy*, 194 F.2d 362, 363 (2d Cir. 1952).

[7] It is argued that the failure to make the chain of command apparent prior to departure was an error by the managing officers of the corporation and, consequently, within the owner's privity and knowledge. *Craig* v. *Continental Ins. Co.*, 141 U.S. 638, 12 S.Ct. 97, 35 L.Ed. 886 (1891). But without regard to whether he acted in the capacity of Captain or Mate, Reimer was well aware that he was unprepared to navigate under the difficult conditions which were rapidly developing. Kiernan was quite emphatic that he was willing to render assistance to Reimer whether he was Captain or Mate. Therefore, it was Reimer's failure to seek assistance, more than Kiernan's failure to offer it, that caused the accident. Reimer's failure in this regard is similar to the neglect of an otherwise competent officer to consult available charts and aids to navigation —an event which is not an unseaworthy condition for which the owner is responsible. *California and Hawaiian Sugar Co.* v. *Columbia S. S. Co.*, 391 F.Supp. 894 (E.D. La. 1972), *aff'd*, 510 F.2d 542 (5th Cir. 1975). Plaintiffs are, therefore, entitled to limit their liability.

Governmental Responsibility for the Grounding

We turn now to the plaintiff's contention that the Government's negligence in maintaining the aids to navigation in the area of the grounding was a factor in the grounding

and, therefore, the Government should be found liable for negligence under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52.

In *Indian Towing Co.* v. *United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the Supreme Court recognized that liability under the Federal Tort Claims Act extended to the Coast Guard's failure to adequately maintain a lighthouse. Contrasting nonfeasance and misfeasance, the Court held that, while the Coast Guard had no obligation to supply lighthouse services, once it exercised its discretion by electing to do so, it must use due care. Consequently, the Coast Guard was under a duty to maintain the equipment and to warn mariners in the event the lighthouse became inoperative.

Indian Towing was applied to the placement and maintenance of buoys by this court in *Afran Transport Co.* v. *United States*, 309 F.Supp. 650 (S.D.N.Y. 1969), *aff'd*, 435 F.2d 213 (2d Cir. 1970), *cert. denied*, 404 U.S. 872, 92 S.Ct. 72, 30 L.Ed.2d 116 (1971). In that case, damages were sought following the grounding of an oil tanker on a reef caused by a marker buoy having drifted out of position. Again, while the decision to erect a navigational aid lay within the Coast Guard's discretion, having acted, the Coast Guard was required to act with due care.

[8] Thus *Indian Towing* imposes a dual responsibility upon the Coast Guard, once it has decided to locate an aid to navigation in a waterway. First, the Coast Guard must use due care to see that the aid is properly maintained and operated. Secondly, should an aid become inoperative the Coast Guard has an additional duty to warn mariners of the absence of the expected aid. Merely warning mariners of a perilous condition, as a rule, will not absolve the Coast Guard of the duty to correct a dangerous condition, but adequate warnings may absolve them from a particular lia-

bility. *Compare Greer* v. *United States,* 505 F.2d 90 (5th Cir. 1974) with *De Bardeleben Marine Corp.* v. *United States,* 451 F.2d 140 (5th Cir. 1971).

[9] In the instant case, the Coast Guard was confronted with submerged rocks at the periphery of the Hudson River channel relatively close to another aid to navigation (Con Hook Light). This area had a good safety record during most of the year while the lighted aid was in use. At the time of the Ocean Prince grounding, the buoy was in position, although obscured by ice. Applying *Indian Towing* to these facts, the Coast Guard had the duty to maintain the buoy or to warn of any interruption of service. The evidence demonstrates that the Coast Guard, in the Coast Pilot, warned mariners of the possibility of ice obstructing buoys *in this particular* span of waterway and, additionally, the "Notice to Mariners" for the week of the accident made particular mention of the problem of ice covered buoys in that area. Absent a showing that the Coast Guard had notice of ice covering this particular buoy during the day in question (and could have repaired it), the Court is not persuaded that the Coast Guard was negligent in its servicing of the buoy.

The Coast Guard had determined (and the evidence supported its conclusion) that during the winter months a can buoy was the most effective floating aid to navigation available. The large, lighted buoy not only was more vulnerable to flow ice, but was also subject to the added danger that the light would be broken, thereby extinguishing the expected aid. The plaintiff does not strenuously challenge this but argues, instead, that the problems of maintaining the buoy ice free and the dangers of the location, warranted the installation of different forms of aids to navigation, either constructed on man-made islands or shore-based range lights.

In considering the dangers of the location, some evidence was admitted concerning accidents at the site during the prior thirty years, as well as two groundings (one of which resulted in a severe ecological disaster) occurring in the following couple of years.

[10, 11] Courts have generally recognized that evidence of a *prior* similar accident has some tendency to establish a dangerous or defective condition at the place in question. *Hayes* v. *Lane Construction Corp.,* 260 F.2d 279 (2d Cir. 1958) (applying New York law); *Balchunas* v. *Palmer,* 151 F.2d 842 (2d Cir. 1945) (applying Conn. law). Such evidence draws its relevance from the principle that similar causes can be expected to produce similar effects, so that admissibility hinges upon a demonstration that the conditions had been substantially similar on all occasions. *Hayes, supra; Balchunas, supra; Knight* v. *Baltimore & Ohio R.R. Co.,* 8 F.R.D. 261 (S.D.N.Y. 1948).

Judge Weinstein, in his treatise on evidence, does not distinguish between prior and subsequent accidents, but states generally that

> "[e]vidence of other accidents in the same place or involving the same machinery or instrumentality is generally admissible, not because it shows that defendant has a general tendency to be negligent, but because it tends to prove either (1) the existence of a dangerous or defective condition where this is in issue or (2) that defendant knew or should have known of the dangerous or defective condition.
>
> "The requisite similarity of accidents depends on what the evidence is designed to prove:
>
> 'If the proof of other accidents is offered to establish the dangerous condition, logic would require similarity of hazard. But if offered to prove notice

> of danger, the requisite is the warning quality of the other accident. Thus evidence of a previous accident at the place, unknown to the owner defendant, would be irrelevant to prove notice of the danger, but it may be relevant to prove the dangerous condition of the place. Likewise, evidence that is unnecessary to prove dangerous condition may be logically relevant to prove the notice of the hazard. Of course as the circumstances of other accidents are more similar to the one in question, the probative value of such evidence for either or both purposes is likely to be greater.' " 2 J. Weinstein & M. Berger, Weinstein's Evidence § 404[11] at 404-76 (1976), citing, Trautman, "Logical or Legal Relevancy—A Conflict in Theory," 5 Vand.L.Rev. 385, 402 (1952).

While the subsequent disasters have emphasized the navigational hazard in this area, we must evaluate the reasonableness of the Coast Guard's decisions on the basis of facts available at the time of the grounding. Prior thereto, and over a period of thirty or so years, despite an extremely heavy volume of traffic, there had only been two groundings under similar circumstances. (One of them, to the mortification of the Coast Guard, involved the Cutter Sauk in 1963. Another cutter, in completely dissimilar circumstances, ran aground in 1969—causing the reef to be known locally as "Coast Guard Rock".)

Although, at the time of the accident the location was not considered to have a high priority among Hudson River sites needing additional aids to navigation, some consideration was given to the situation by the Coast Guard's officials. Evidence as to the cost and feasibility of aids to navigation other than a buoy at this location persuades the Court that the Coast Guard used due care in its decision to mark the reef in the winter of 1974 with

a black can buoy. The Coast Guard weighed the need for some other aid to navigation against the costs of various fixed lights, constructions on the pinnacle or its demolition. It also considered the ecological problems in establishing shore based aids, the priority needs of other, more dangerous, locations and the funds available.

In the absence of showing that a can buoy was so ineffective that its choice constituted negligence *per se*, the Coast Guard should not be divested of its executive discretion to choose such aids to navigation as will most effectively and efficiently function within its fixed budgetary limitations. In so concluding, it must be stressed that this evaluation is limited to the history of the hazard in 1974. The Coast Guard's liability for the subsequent groundings, and the wisdom of erecting different types of aids to navigation at this time, are issues not before this Court.

[12] There is a further reason for refusing to find the Coast Guard liable for this accident. Reimer had available for navigational purposes both radar, which could take bearings and ranges on prominent objects (such as Bear Mountain Bridge) and the Con Hook Light, on which a visual bearing could have been taken. Nevertheless, he strayed west of the channel looking for an obscured buoy. The premise that the presence of additional aids might have assisted in correcting his navigational error would be a

> "fortuity [having] nothing to do with proximate cause. Liability must rest on causal relationship between the negligent aspect of the conduct and the harm resulting from the conduct."

American Smelting and Refining Co. v. *S.S. Irish Spruce*, 548 F.2d 56, 60 (2d Cir. 1977).

It cannot be said, therefore, that the negligence, if any, of the Government in not establishing more effective aids to navigation was the proximate cause of the grounding.

The Amount of Plaintiff's Liability Under the Water Quality Improvement Act

The Water Quality Improvement Act of 1970, as amended by the Federal Water Pollution Control Amendments of 1972, was passed by Congress in the wake of two disastrous oil spills: the running aground of the tanker, Torrey Canyon, off the coast of England in 1967 and the Santa Barbara drilling disaster in 1969. The primary purpose of the new legislation was to permit the Government to collect cleanup costs directly from the polluter. To effect this goal, the Act provided, in Section 102(f)(1) of the Water Quality Improvement Act of 1970, later codified at 33 U.S.C.A. § 1321(f)(1) (Supp. 1977) that:

> "Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) *an act or omission of a third party without regard to whether any such act or omission was or was not negligent,* or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged . . . shall . . . be liable to the United States Government for the actual costs incurred . . . in an *amount not to exceed $100 per gross ton of such vessel or $14,000,000,* whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner

> or operator shall be liable to the United States Government for the full amount of such costs." (emphasis added).

In other words, the owner or operator of a vessel which discharges oil can limit its liability, provided the government cannot show willful negligence or misconduct.

The legislative history indicates that conflicting policies resulted in both the limitation amount and the willful negligence standard for breaking the limitation. The Senate bill, as introduced, would have imposed liability only if negligence were shown. The original limitation amount was the lesser of $450 per gross ton or $15 million. The $450 amount was based upon the estimated cleanup cost of one ton of oil. Later evidence indicated that while this figure reflected an accurate, cleanup estimate, it was improbable that any vessel would discharge its entire cargo. The $100 figure was thereafter substituted to approximate actual, anticipated costs. S.Rep.No. 91-351 at 4, 91st Cong., 1st Sess. (1969), 3 E.P.A. Legal Compilation (Water) at 1327.

[13] While the limitation amount appears to reflect actual cleanup costs, this goal is not realized where a third party causes the oil spillage. Section 102(g), 33 U.S.C.A. § 1321(g) (Supp.1977) controls third party liability and provides that subject to the same defenses provided in Section 102(f)(1), a third party which causes an oil spill will be liable instead of the owner or operator of the spilling vessel. This section also contains a limitation of liability, and further distinguishes situations where the third party is the owner or operator of a *vessel* from other third party situations. Where the third party *is* an owner or operator of a vessel "the liability of such third party . . . shall not exceed $100 per gross ton *of such vessel* or $14,000,000, whichever is the lesser." (emphasis added).

The section goes on to provide that where the third party causing the spillage is not an owner or operator of a vessel, its liability "shall not exceed the limitation which would have been applicable to the *owner or operator of the vessel . . . from which the discharge actually occurred.*" (emphasis added). Clearly this represents a conscious legislative choice to inject traditional admiralty concepts into the limitation calculation by limiting a third party vessel owner's liability with reference to *his* vessel rather than the vessel which actually spilled the oil. Obviously, once the limitation is calculated with reference to a vessel other than that which spilled the oil, the correlation between vessel gross tonnage and actual cleanup is destroyed.

[14] The legislative history indicates that the drafters, in providing the third party defense, envisioned a situation where the third party vessel *collides* with an oil-carrying vessel. S.Rep.No. 91-351 at 5, 91st Cong., 1st Sess. (1969), 3 E.P.A. Legal Compilation (Water) at 1329. The available legislative materials provide no clue as to whether the drafters ever considered the situation presented where a substantially smaller vessel either collides with or, as presented here, negligently causes the oil spillage. It is inconceivable that Congress was unaware that much of the oil moving on inland waterways is carried by barges and that the tugs pushing them are often owned by third parties. Faced with the clear choice to limit a third party's liability with reference to the gross tonnage of a vessel not spilling the oil, the Court must construe the section in accordance with the clear import of its terms, even if the effect would seem contrary to the general legislative intent. Where statutory language is clear and unequivocal, there is no occasion for the Court to resort to interpretive aids. *United States* v. *Oregon,* 366 U.S. 643, 648, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *Arkansas Valley Industries, Inc.* v. *Freeman,* 415 F.2d 713, 717 (8th Cir. 1969).

In the face of unequivocal statutory language and the absence of conflicting legislative history, the Government nevertheless contends that the "flotilla rule" should apply. Application of this rule would result in the calculation of the limitation amount by reference to the combined gross tonnage of the tug and the barge. While no authority has been submitted concerning the application of the rule in the statutory context presented here, it has been applied in traditional admiralty petitions for exoneration or limitation of liability. The Supreme Court in *Sacramento Nav. Co.* v. *Salz,* 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed. 663 (1927) required surrender not only of a barge but also of the steamboat towing the barge in an action by the owners of the barge's cargo. In a later case, *Standard Dredging Co.* v. *Kristiansen,* 67 F.2d 548, 550 (2d Cir. 1933), the Second Circuit interpreted the flotilla rule to permit recognition of a tug and barge as a single vessel where they are "owned in common and engaged in a common enterprise." Thus, the rule which emerged, as the Government concedes, is that where there exists a contractual or other obligation running from the petitioner for limitation to the claimant and a flotilla of commonly owned vessels was used to fulfill the obligation, the flotilla is regarded as one vessel for calculating the limitation fund.

[15] The Tug Ocean Prince and the barge were not owned by the same entity nor is there any vestige of a contractual relationship running between the owners of either of these two vessels and the Government. Consequently, the flotilla rule, as traditionally stated, would be inapplicable to the facts of this case. The Government, conceding this much, would have this Court break new ground, and apply a mutation of the rule to flesh out the terms of the statute. As the discussion of the language and history of the statute indicates, the provision limiting the liability of

third party vessel owners to the value of their vessel is unambiguous. The Court cannot substitute its notions of proper legislative goals for those adopted by Congress. *Arkansas Valley Industries, Inc.* v. *Freeman, supra.*

The Amount of the Penalty To be Assessed Against Pittston

The penalty provision added by the Federal Water Pollution Control Act Amendment of 1972, codified at 33 U.S.C. § 1321(b)(6) (Supp. 1977) reads in pertinent part:

> "Any owner or operator of any vessel . . . from which oil . . . is discharged . . . shall be assessed a civil penalty . . . of not more than $5000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge . . ."

A civil penalty in the amount of $5,000 was assessed against Pittston after a hearing before a Coast Guard hearing examiner. Pittston had refused to pay the penalty on the authority of the federal district court holding in *United States* v. *LeBeouf Bros. Towing Co.,* 377 F.Supp. 558 (E.D. La. 1974). The lower court had held that the penalty provided by 33 U.S.C.A. § 1321(b)(6) (Supp. 1977) was criminal in nature and could not be imposed except in a criminal proceeding which afforded adequate protections for Fifth and Sixth amendment rights. This holding was thereafter reversed on appeal, 537 F.2d 149 (5th Cir. 1976) and a petition for *certiorari* has been denied, 430 U.S. 987, 97 S.Ct. 1688, 52 L.Ed.2d 383 (1977). With the exception of this single, lower court holding, courts appear to be unanimous in finding the penalty civil. *United States* v. *General Motors Corp.,* 403 F.Supp. 1151 (D.Conn. 1975); *United States* v. *Eureka Pipeline Co.,* 401 F.Supp. 934 (N.D. W.Va. 1975); *United States* v. *Independent Bulk Transport, Inc.,* 394 F.Supp. 1319 (S.D.N.Y. 1975); *United States* v. *W. B. Enterprises, Inc.,* 378 F.Supp. 420 (S.D.N.Y. 1974).

The penalty provision at issue holds the owner or operator of a vessel strictly liable for the penalty, following a hearing at which normal due process safeguards are extended. Section 1321(b)(6) provides that "[i]n determining the amount of the penalty . . . the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered. . . ."

The Coast Guard has stated its interpretation of these standards in "Coast Guard Policy for the Application of Civil Penalties Under Section 311(b)(6), FWPCA," which was printed as an appendix to the lower court decision in *United States* v. *LeBeouf Bros. Towing Co., supra,* at 569-70. While the statute does not explicitly include the degree of the actor's culpability as a factor in assessing the amount of the fine, the Coast Guard policy statement emphasizes that "[a] number of considerations may be made in determining the gravity of a violation, such as the *degree of culpability associated with the violation,* the prior record of the responsible party, and the amount of oil discharged. Substantial intentional discharges should result in severe penalties, as should cases of gross negligence, and so on. This is not to suggest that other considerations may not combine to determine the gravity of a violation." *Id.* at 569 (emphasis added).

In this context, it is valuable to note that while the 1972 amendments make no reference to culpability as a prerequi-

site for a substantial fine,[2] the predecessor of this penalty did. Section 11(b) of the Water Quality Improvement Act of 1970, Pub. L.No. 91-224, previously codified at 33 U.S.C. § 1161(b)(5), provided for a maximum fine of $10,000 for "knowing" discharges. The 1966 amendments to the Oil Pollution Act of 1924 created liability when a discharge resulted from a "grossly negligent or willful act." *Note, Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970,* 55 Cornell L.Rev. 973 (1970).

Thus, while the section does not expressly require culpable behavior, prior legislation and the Coast Guard interpretive standards for implementing the penalty all make reference to some element of negligent or knowing conduct prior to the imposition of a substantial penalty. The Government contends that the maximum fine should be assessed against Pittston on the sole basis of the "gravity of the violation," without any consideration of the degree of Pittston's culpability. The Government further argues that, while third party causation does not provide a defense to imposition of the penalty, it does provide a basis for indemnity.

The only case disclosed by our research where the third party's responsibility is discussed is *United States* v. *General Motors Corp.,* 403 F.Supp. 1151 (D.Conn. 1975). In that case, vandals opened the valves of several of defendant's oil storage tanks causing oil to flow into a nearby river. In an extended analysis of the history and purpose of the penalty, Judge Clarie found that while third party causation did not constitute a defense, defendant's lack of

[2] The Senate bill provided for assessment of the penalty where the government could show that the owner or operator acted "wilfully or negligently." S.Rep. 92-414, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S.Code & Ad.News 3732.

culpability would require reduction of the penalty to the nominal sum of one dollar.[3]

Of course, the present case differs from *General Motors* in that the purportedly culpable party, The Tug Ocean Prince, is before the Court. There are three possible responses to this situation, in that the Court could: 1) obviate the need for indemnity by reducing the fine to a nominal sum; 2) following the Coast Guard's procedure and assess the entire fine against Pittston while recognizing a right to indemnity; 3) assess the fine against the allegedly culpable party, The Tug Ocean Prince. The first course would follow the only authority on point. The second alternative requires more discussion.

Section 1321 does provide generally for indemnity by stating that:

> "The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel . . . may have against any third party whose acts may in any way have caused or contributed to such discharge. . . ."

33 U.S.C.A. § 1321(h) (Supp. 1977). The issue then becomes whether the penalty imposed by Section 1321(b)(6) is a "liability" so as to provide a basis for indemnity. The parties draw support for their indemnity theory by pointing to the penalty provided in 33 U.S.C.A. § 1321(b)(2)(B)(iii) (Supp. 1977) which imposes a "penalty" in lieu

[3] The parties had stipulated that the proceedings before Judge Clarie should proceed as a trial *de novo,* and therefore the judge indicated that it was appropriate "to consider whether the sanction imposed by the administrative agency conforms to the facts brought out at the trial." The court found that the Coast Guard's finding that defendants were negligent deviated from the facts.

of cleanup costs where it is impossible to remove a hazardous substance from the water. This penalty, unlike that of Section 1321(b)(6), is denominated a "liability" and is subject to the defense of third party causation.

[16] Clearly, no indemnity could have been sought had the penalty been construed as criminal, intended to punish the actor. The weight of current authority, discussed above, has concluded that this particular penalty is civil and, therefore, the claimed right to indemnity is at least tenable. However, the penalty imposed in lieu of clean-up costs correlates not to the penalty provision at issue here, but rather to the Government's action for the actual costs of clean-up. Both of these actions recognize the third party defense, and, thereby, implicitly provide a ground for indemnity. The absence of a third party defense in this penalty provision, the language of the statutes, and the purposes of the various remedies supplied to the Government, lead to the conclusion that no indemnity right was contemplated for the penalty imposed by Section 1321(b)(6), even though it is civil in nature.

Finally, the Government urges that the "flotilla rule" should apply not only to determine the correct limitation amount but also the possible imposition of the fine on the third party, Tug Ocean Prince. Both the penalty provision, Section 1321(b)(6), and the provision governing primary liability for cleanup costs, Section 1321(f), impose liability on the "owner or *operator* of a vessel." It is at least a tenable construction of the statutory language, as applied to the facts of case that "operator" should be construed to include to a tug operating a "dumb" barge. It is uncertain whether this construction of the statute was argued before the Coast Guard hearing examiner, but by imposing the fine solely upon Pittston, the examiner implicitly rejected this view. Similarly, the Government's

stance in its action for cleanup costs in that Tug Ocean Prince is liable, if at all, under Section 1321(g) which concerns third party liability. Thus, the Government has adopted a contrary position and has not taken the required administrative steps to impose liability on plaintiff.

[17] For these reasons, and in light of the *General Motors* decision, it appears to be the better course not to recognize a right to indemnity and, instead, to permit the absence of culpability to mitigate the amount of the fine. The case should be remanded to the Coast Guard to set a fine consistent with the degree of culpability attributable to the barge owner.

ORDER

1. Plaintiffs are entitled to limit their liability to the value of the Tug Ocean Prince and the amount of her pending freight immediately after the grounding, for which amount Pittston is entitled to judgment with costs.
2. Pittston, not having been responsible for the oil spill, the Government's cause of action against it for cleanup costs is dismissed with costs.
3. The claims of plaintiffs and Pittston against the United States (in 74 Civ. 3358) and Pittston's counterclaim (in 75 Civ. 5801) are dismissed with costs.
4. Plaintiffs are liable to the United States for cleanup costs not to exceed $19,800.
5. The fine against Pittston is remanded to the Coast Guard for reconsideration consistent with this opinion. Pittston's claim for indemnity from plaintiffs is dismissed with cost.

6. If the parties cannot agree on the amount of cleanup costs or the amount of the limitation fund, they should advise the Court and the matter will be set for inquest.

So ORDERED.

APPENDIX C

33 U.S.C. §1321(g)

"(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section was the re-

sult of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs."

APPENDIX D

Order on Petition for Rehearing

(Filed—September 26, 1978)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and seventy-eight.

Present:

HON. JAMES L. OAKES
HON. WILLIAM O. MEHRTENS
HON. M. JOSEPH BLUMENFELD
Circuit Judges.

IN THE MATTER OF THE COMPLAINT OF TUG OCEAN PRINCE INC. AND RED STAR TOWING & TRANSPORTATION CO., AS OWNER AND CHARTERER OF THE TUG "OCEAN PRINCE" FOR EXOERATION FROM OR LIMITATION OF LIABILITY,

Plaintiffs & Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

77-6190

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

v.

PITTSTON MARINE TRANSPORT CORP., RED STAR TOWING AND TRANSPORTATION CO. TUG OCEAN PRINCE, INC., TUG "OCEAN PRINCE" AND BARGE "NEW LONDON" IN REM,

Defendants,

PITTSTON MARINE TRANSPORT CORP., TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION CO.,

Defendants-Appellants
Cross-Appellees.

77-6195

A petition for rehearing having been filed herein by counsel for the Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Order on Petition for Rehearing

(Filed—September 26, 1978)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of September, one thousand nine hundrer and seventy-eight.

IN THE MATTER OF THE COMPLAINT OF TUG OCEAN PRINCE INC. AND RED STAR TOWING & TRANSPORTATION CO., AS OWNER AND CHARTERER OF THE TUG "OCEAN PRINCE" FOR EXOERATION FROM OR LIMITATION OF LIABILITY,

Plaintiffs & Third
Party Plaintiffs,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

77-6190

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

v.

PITTSTON MARINE TRANSPORT CORP., RED STAR TOWING AND TRANSPORTATION CO. TUG OCEAN PRINCE, INC., TUG "OCEAN PRINCE" AND BARGE "NEW LONDON" IN REM,

Defendants,

PITTSTON MARINE TRANSPORT CORP., TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION CO.,

Defendants-Appellants
Cross-Appellees.

77-6195

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

APPENDIX E

Judgment

(Filed—August 7, 1978)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of August one thousand nine hundred and seventy-eight.

Present:

HON. JAMES L. OAKES
Circuit Judge
HON. M. JOSEPH BLUMENFELD
HON. WILLIAM O. MEHRTENS
District Judges.

IN THE MATTER OF THE COMPLAINT OF TUG OCEAN PRINCE INC. AND RED STAR TOWING & TRANSPORTATION CO., AS OWNER AND CHARTERER OF THE TUG "OCEAN PRINCE" FOR EXOERATION FROM OR LIMITATION OF LIABILITY,

Plaintiffs & Third
Party Plaintiffs,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

77-6190

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

v.

PITTSTON MARINE TRANSPORT CORP., RED STAR TOWING AND TRANSPORTATION CO. TUG OCEAN PRINCE, AND BARGE NEW LONDON IN REM,

Defendants,

PITTSTON MARINE TRANSPORT CORP., TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION CO.,

Defendants-Appellants
Cross-Appellees.

77-6195

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in part, affirmed in part, and remanded for further proceedings in accordance with the opinion of this court, with costs to be taxed against Red Star Towing & Transportation Co. and Tug Ocean Prince, Inc.

A. DANIEL FUSARO
Clerk

By (Illegible)
Deputy Clerk